

2924
No. 14630

United States
Court of Appeals
for the Ninth Circuit

LOUIS P. LUTFY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

MAY 18 1955

PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Clerk's Certificate to Record on..... 448

Notice of 45

Order Extending Time for Docketing..... 48

Order Granting Stay of Execution and Ad-
mitting Bail on..... 44

Statement of Points Upon on (U.S.D.C.).. 48

Statement of Points Upon on (U.S.C.A.).. 453

Attorneys of Record..... 1

Bill of Particulars..... 11

Bill of Particulars, Amended..... 16

Clerk's Certificate to Record on Appeal..... 448

Docket Entries of March 12, and October 18,
1954 47

Indictment 3

Judgment and Commitment..... 42

Minute Entries:

May 4, 1953—Arraignment and Plea..... 15

October 9, 1953—Trial Setting..... 15

INDEX

PAGE

Minute Entries—(Continued):

December 23, 1953—Order for Filing of Proposed Amended Bill of Particulars as Bill of Particulars Herein and Trial Re- setting	17
February 8, 1954—Order Striking Defend- ant's Motion for Bill of Particulars Subject to Reinstatement by Either Party	22
September 7, 1954—Proceedings of Trial..	23
September 8, 1954—Proceedings of Trial..	25
September 9, 1954—Proceedings of Trial..	29
September 10, 1954—Proceedings of Trial.	30
September 14, 1954—Proceedings of Trial.	32
September 15, 1954—Proceedings of Trial.	34
September 16, 1954—Proceedings of Trial.	35
September 20, 1954—Order Granting Addi- tional Time for Defendant to File Sup- plemental Grounds in Support of Motion for New Trial, etc.....	41
October 18, 1954—Order Denying Defend- ant's Motion for New Trial.....	41
November 18, 1954—Order Extending Time to File Record on Appeal to January 4, 1955	47
January 10, 1955—Order Extending Time for Docketing Record on Appeal to Feb- ruary 1, 1955.....	52

INDEX

PAGE

Motion for Bill of Particulars.....	7
Motion for Further Particulars, Defendant's..	17
Motion for New Trial.....	37
Notice of Appeal.....	45
Order Extending Time for Docketing Appeal and Transmitting Record.....	48
Order Granting Stay of Execution and Admit- ting to Bail on Appeal.....	44
Reply to Defendant's Motion for Further Par- ticulars, Government's	20
Statement of Points Upon Which Defendant- Appellant Relies on Appeal (U.S.D.C.).....	48
Statement of Points Upon Which Appellant Relies on Appeal (U.S.C.A.).....	453
Transcript of Proceedings.....	52
Instructions to the Jury.....	445
Witnesses:	
Bamrick, Edward J.	
—direct	129, 133
—cross	133
—redirect	137
Beale, Clarence J.	
—direct	59, 86
Donovan, Fred	
—direct	79

	INDEX	PAGE
Witnesses—(Continued):		
Fairfield, John L.		
—direct		68
—voir dire		70
Foster, Robert M.		
—direct		84
Herre, Robert F.		
—direct		71
—cross		77
Larson, Mrs. Margaret		
—direct		81
Linsenmeyer, Howard		
—direct		56
—cross		57
Lutfy, Bertha A.		
—direct	279,	304
—cross		308
—redirect		320
—recross		324
McGuckin, Hugh		
—direct		53
—cross		55
Moser, R. Dale		
—direct		325
—cross	377,	425
—redirect		432
—recross		438

INDEX

PAGE

Witnesses—(Continued):

Way, Raye

—direct	96
—cross	108
—redirect	126
—recross	128

Wightman, Charles M.

—direct	78
---------------	----

Whitsett, Howard H.

—direct	142, 159, 193, 212
—voir dire	158
—cross	217, 226
—redirect	261, 272
—recross	271

Verdict	37
---------------	----

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Attorneys for Appellee.

In the United States District Court
for the District of Arizona

No. C-10712 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS P. LUTFY,

Defendant.

INDICTMENT

Violation: 26 U.S.C. 145(b) (Attempt to defeat and
evade income tax.)

The Grand Jury charges:

Count I.

That on or about the 15th day of March, 1947, in the District of Arizona, Louis P. Lutfy, a resident of Phoenix, Arizona, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year, computed on the community property basis, was the sum of \$2,309.91, and that the amount of tax due and owing thereon was the sum of \$248.88, whereas, as he then

and there well knew, his net income for said calendar year, computed on the community property basis, was the sum of \$10,168.11, upon which said net income he owed to the United States of America an income tax of \$2,239.44.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count II.

That on or about the 15th day of March, 1947, in the District of Arizona, Louis P. Lutfy, who, during the calendar year 1946, was married to Bertha A. Lutfy, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Bertha A. Lutfy to the United States of America, for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent income tax return for and on behalf of the said Bertha A. Lutfy, in which it was stated that her net income for said calendar year, computed on the community property basis, was the sum of \$2,309.91 and that the amount of tax due and owing thereon was the sum of \$153.88, whereas, as he then and there well knew, her net income for the said calendar year, computed on the community property basis, was the sum of \$10,168.11, upon which said net income there was owing to the United States of America, an income tax of \$2,077.80.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count III.

That on or about the 1st day of March, 1948, in the District of Arizona, Louis P. Lutfy, a resident of Phoenix, Arizona, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community property basis, was the sum of \$4,177.19, and that the amount of tax due and owing thereon was the sum of \$626.03, whereas, as he then and there well knew, his net income for said calendar year, computed on the community property basis, was the sum of \$13,293.16, upon which said net income he owed to the United States of America an income tax of \$3,349.76.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count IV.

That on or about the 1st day of March, 1948, in the District of Arizona, Louis P. Lutfy, a resident of Phoenix, Arizona, who, during the calendar year 1947 was married to Bertha A. Lutfy, did wilfully

and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Bertha A. Lutfy to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent income tax return for and on behalf of the said Bertha A. Lutfy, in which it was stated that her net income for the said calendar year, computed on the community property basis, was the sum of \$4,177.18, and that the amount of tax due and owing thereon was the sum of \$521.53, whereas, as he then and there well knew, her net income for the said calendar year, computed on the community property basis, was the sum of \$13,293.16, upon which said net income there was owing to the United States of America an income tax of \$2,931.53.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count V.

That on or about the 8th day of February, 1949, in the District of Arizona, Louis P. Lutfy, who, during the calendar year 1948, was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Arizona, at Phoenix, Arizona, a false and fraudulent joint in-

come tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$18,453.62, and that the amount of tax due and owing thereon was the sum of \$3,265.36, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$32,790.65, upon which said net income there was owing to the United States of America an income tax of \$8,198.22.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

A True Bill.

/s/ MARVIN L. CHAPMAN,
Foreman.

/s/ [Illegible.]
United States Attorney.

[Endorsed]: Filed February 26, 1953.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes Now the defendant and moves the Court for an Order directing the United States Attorney to serve and file a Bill of Particulars of the above-described Indictment, particularly setting forth the following:

1. The items of income which, according to the government's information, defendant omitted from

his income tax return described in Count I of the Indictment.

2. The source of each such item of income so omitted, according to the government's information, described in Count I of the Indictment.

3. The deductions not allowed by law, if any, which, according to the government's information, the defendant took in his income tax return described in Count I of the Indictment.

4. The items of income, which, according to the government's information, defendant caused Bertha A. Lutfy to omit from her income tax return described in Count II of the Indictment.

5. The source of each such item of income so omitted, according to the government's information, described in Count II of the Indictment.

6. The deductions not allowed by law, if any, which according to the government's information, the defendant caused Bertha A. Lutfy to take in her income tax return described in Count II of the Indictment.

7. The items of income which, according to the government's information, defendant omitted from his income tax return described in Count III of the Indictment.

8. The source of each such item of income so omitted, according to the government's information, described in Count III of the Indictment.

9. The deductions not allowed by law, if any, which according to the government's information,

the defendant took in his income tax return described in Count III of the Indictment.

10. The items of income, which, according to the government's information, defendant caused Bertha A. Lutfy to omit from her income tax return described in Count IV of the Indictment.

11. The source of each such item of income so omitted, according to the government's information, described in Count IV of the Indictment.

12. The deductions not allowed by law, if any, which, according to the government's information, the defendant caused Bertha A. Lutfy to take in her income tax return described in Count IV of the Indictment.

13. The items of income, which, according to the government's information, defendant omitted from his income tax return described in Count V of the Indictment.

14. The source of each item of income so omitted, according to the government's information, described in Count V of the Indictment.

15. The deductions not allowed by law, if any, which, according to the government's information, the defendant took in his income tax return described in Count V of the Indictment.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendant.

In support of the foregoing Motion for a Bill of Particulars, defendant respectfully represents to the Court that he is a physician, engaged in the general practice of medicine and surgery, by reason whereof a large number of items enter into his aggregate income for any year in question. In addition thereto, many items of expense and other deductions which defendant believes himself legitimately entitled to, are also involved in determining the appropriate deductions to be taken by defendant in ascertaining his net or taxable income for any of the years in question. In addition thereto, defendant during the years in question from time to time made certain investments in real estate, certain sales and other business transactions, all of which require that the defendant be apprised in advance of the trial as to the particular transactions or items going into the tax return of any of the years in question are claimed by the government to be illegal or improper, as otherwise defendant will be entirely unable to prepare for trial and to meet the accusations of the government other than through tedious delays in the course of the trial.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendant.

[Endorsed]: Filed April 20, 1953.

[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes Now the United States of America, by Edward W. Scruggs, United States Attorney for the District of Arizona, and James E. Hunter, Assistant U. S. Attorney, and presents this Bill of Particulars furnished by the United States to the defendant, Louis P. Lutfy, pursuant to Motion for Bill of Particulars filed by defendant herein.

Count I.

In answer to paragraph 1 of defendant's Motion for Bill of Particulars:

Community one-half of additional income described in plaintiff's answer to paragraph 2 of defendant's Motion for Bill of Particulars.

In answer to paragraph 2 of defendant's Motion for Bill of Particulars:

Interest	\$ 141.11
Rental receipts	2,481.12
Capital gains	3,564.30
Business income	9,529.88

Total omitted income.....	\$15,716.41
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Community one-half of

Louis P. Lutfy.....	\$ 7,858.20
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In answer to paragraph 3 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant took deductions not allowed by law.

Count II.

In answer to paragraph 4 of defendant's Motion for Bill of Particulars:

Community one-half of additional income described in plaintiff's answer to paragraph 5 of defendant's Motion for Bill of Particulars.

In answer to paragraph 5 of defendant's Motion for Bill of Particulars:

Interest	\$ 141.11
Rental receipts	2,481.12
Capital gains	3,564.30
Business income	9,529.88
Total omitted income.....	<u>\$15,716.41</u>

Community one-half of Bertha A.

Lutfy\$ 7,858.21

In answer to paragraph 6 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant caused Bertha A. Lutfy to take deductions not allowed by law.

Count III.

In answer to paragraph 7 of defendant's Motion for Bill of Particulars:

Community one-half of additional income described in plaintiff's answer to paragraph 8 of defendant's Motion for Bill of Particulars.

In answer to paragraph 8 of defendant's Motion for Bill of Particulars:

Dividends and interest.....	\$ 149.84
Rental Receipts	2,022.17

Capital gains	12.50
Business income	16,386.66
Total omitted income.....	<u>18,571.17</u>
Less loss on sale of other assets.....	339.22
	<u>\$18,231.95</u>
Community one-half of Louis P. Lutfy	\$ 9,115.98

In answer to paragraph 9 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant took deductions not allowed by law.

Count IV.

In answer to paragraph 10 of defendant's Motion for Bill of Particulars:

Community one-half of additional income described in plaintiff's answer to paragraph 11 of defendant's Motion for Bill of Particulars.

In answer to paragraph 11 of defendant's Motion for Bill of Particulars:

Dividends and interest.....	\$ 149.84
Rental Receipts.....	2,022.17
Capital gains	12.50
Business income	16,386.66
Total omitted income.....	<u>18,571.17</u>
Less loss on sale of other assets..	339.22
	<u>\$18,231.95</u>
Community one-half of Bertha A. Lutfy	\$ 9,115.97

In answer to paragraph 12 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant caused Bertha A. Lutfy to take deductions not allowed by law.

Count V.

In answer to paragraph 13 of defendant's Motion for Bill of Particulars:

Community income described in plaintiff's answer to paragraph 14 of defendant's Motion for Bill of Particulars.

In answer to paragraph 14 of defendant's Motion for Bill of Particulars:

Rental income	\$ 2,282.34
Capital gains	2,730.08
Business income	9,324.61
Total omitted income.....	<u>\$14,337.03</u>

In answer to paragraph 15 of defendant's Motion for Bill of Particulars: It is not alleged that the defendant took deductions not allowed by law.

EDWARD W. SCRUGGS,
United States Attorney;

/s/ JAMES E. HUNTER,
Assistant U. S. Attorney.

(Copy mailed.)

[Endorsed]: Filed April 24, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY, MAY 4, 1953

(Phoenix Division)

Defendant's Motion for Bill of Particulars comes on regularly for hearing this day. James E. Hunter, Esq., Assistant United States Attorney, appears for the Government. The defendant is present in person with his counsel Mark Wilmer, Esq. Counsel for the defendant states that Bill of Particulars has been supplied. The defendant is now duly arraigned. The defendant waives reading of the indictment and is now called upon to plead. The defendant's plea is not guilty, which plea is duly entered.

It Is Ordered that this case is set for trial October 27, 1953, at 10:00 o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY, OCT. 9, 1953

(Phoenix Division)

On motion of Mark Wilmer, Esq., counsel for the defendant,

It Is Ordered that said Mark Wilmer is allowed to withdraw as counsel for the defendant herein.

On motion of Darrell Parker, Esq., who appears as counsel for the defendant,

It Is Ordered that the order setting this case for trial at Phoenix on October 27, 1953, is vacated and that this case be transferred to Tucson for further proceedings.

[Title of District Court and Cause.]

AMENDED BILL OF PARTICULARS

The United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and Robert S. Murlless, Assistant United States Attorney for said district, files this Amended Bill of Particulars in response to defendant's Motion for Bill of Particulars.

Counts I-V

As to paragraphs 1 to 15, inclusive, of Counts I-V, inclusive, of Indictment No. C-10,712 Phx., the income which the defendant did not report on his income tax returns for the calendar years 1946 to 1948, inclusive, and the income which was omitted from the income tax returns for those same years of his wife, Bertha A. Lutfy, as alleged in Indictment No. C-10,712 Phx., is based upon annual increases in the defendant's net worth for the years 1946 to 1948, inclusive, plus expenditures in those years. The source or possible source from which such income was derived included income from interest, rental receipts, capital gains, and business income.

JACK D. H. HAYS,

United States Attorney;

/s/ ROBERT S. MURLLESS,

Assistant U. S. Attorney.

[Endorsed]: Filed December 15, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
DECEMBER 23, 1953

Honorable James A. Walsh, United States District
Judge, Presiding.

Jack D. H. Hays, Esquire, United States Attorney, is present for the government. Darrell Parker, Esquire, appears on behalf of the defendant, and

It Is Ordered that plaintiff's application for leave to amend its Bill of Particulars is granted, and It Is Further Ordered that the defendant is granted thirty (30) days following the filing of the amended bill of particulars within which to move for further particulars.

It Is Ordered that the trial setting of this case for January 7, 1954, is vacated and this case is reset for trial at Tucson, on April 13, 1954, at ten o'clock, a.m.

It Is Further Ordered that the proposed amended bill of particulars be filed as the Bill of Particulars herein.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR
FURTHER PARTICULARS

Having considered the content of the Government's original Bill of Particulars filed herein on or

about April 24, 1953, together with the Amended Bill of Particulars filed herein on or about December 15, 1953, defendant and his counsel are more confused and less certain as to the charges which must be met upon the trial of this case than was the case prior to the filing of the Amended Bill of Particulars.

Now, therefore, said defendant, by his attorneys undersigned, respectfully moves the above-entitled Court for an order requiring the United States Attorney to make, furnish and provide the defendant with additional particulars responsive to the following questions:

1. Does the Government continue in its position asserted in the original Bill of Particulars as follows: "It is not alleged that the defendant took deductions not allowed by law"?

2. With respect to Counts I and II of the Indictment, does the Government continue to assert or allege that the defendant failed for the calendar year 1946 to report the following income: Interest, \$141.11; Rental Receipts, \$2,481.12; Capital gains, \$3,564.30; Business income, \$9,529.88; Total omitted income, \$15,716.41; Community one-half of Louis P. Lutfy, \$7,858.20; Community one-half of Bertha A. Lutfy, \$7,858.21?

3. With respect to Counts III and IV of the Indictment does the Government continue to assert or allege that the defendant failed, for the calendar year 1947, to report the following income: Divi-

dends and interest, \$149.84; Rental Receipts, \$2,022.17; Capital gains, \$12.50; Business income, \$16,386.66; Total omitted income, \$18,571.17, less loss on sale of other assets, \$339.22, \$18,231.95; Community one-half of Louis P. Lutfy, \$9,115.98; Community one-half of Bertha A. Lutfy, \$9,115.98?

4. With respect to Count V of the Indictment, does the Government continue to assert or allege that the defendant failed, for the calendar year 1948, to report the following income: Rental income, \$2,282.34; Capital gains, \$2,730.08; Business income, \$9,324.61; Total omitted income, \$14,337.03?

It appears from the Amended Bill of Particulars that the Government expects to attempt to convict defendant as charged in the Indictment “* * * upon annual increases in the defendant’s net worth for the years 1946 to 1948, inclusive, plus expenditures in those years.” That defendant respectfully moves the above-entitled Court that the said Amended Bill of Particulars be made more specific by requiring the attorneys for the Government to set forth the following information:

- (a) Net worth of defendant January 1, 1946;
- (b) Net worth of defendant December 31, 1946;
- (c) Net worth of defendant December 31, 1947;
- (d) Net worth of defendant December 31, 1948;
- (e) The amounts which the Government claims defendant expended in each of the three calendar years above-mentioned;

(f) A list, with valuations, of all items constituting defendant's net worth as of the following dates: (1) December 31, 1945, or January 1, 1946; (2) December 31, 1948.

Dated at Phoenix, Arizona, this 22nd day of January, 1954

PARKER & MUECKE,

By /s/ DARRELL R. PARKER,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 25, 1954.

[Title of District Court and Cause.]

GOVERNMENT'S REPLY TO DEFENDANT'S
MOTION FOR FURTHER PARTICULARS

The United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, in reply to Defendant's Motion for Further Particulars, states:

1. All personal deductions listed on Page 3 of the individual income tax returns filed or caused to be filed by defendant with the Collector of Internal Revenue for the district of Arizona, for the calendar years 1946 and 1947, have been allowed as claimed with the exception of the Medical Expense claimed for 1946, and the theft of a Lincoln automobile claimed for 1947. The medical expense listed for

1946 has been disallowed as the amount thereof was not in excess of five per cent of adjusted gross income as corrected. The amount claimed as a deduction resulting from the theft of the Lincoln automobile in 1947, has been disallowed in part.

All nondeductible personal expenses taken as business deductions have been disallowed.

2-3-4. The Government asserts that the income which should have been reported as stated in Counts I to V, inclusive, was determined upon the basis of annual increases in the net worth of the defendant and his wife for the years 1946 to 1948, inclusive, plus nondeductible expenditures made by them in those years, and that the source or possible source from which such income was derived included rental receipts, capital gains, interest, and/or professional business.

4(a) to 4(d). The Government alleges, as follows:

- (a). Net worth, December 31, 1945. \$ 61,248.40
- (b). Net worth, December 31, 1946. 71,886.55
- (c). Net worth, December 31, 1947. 87,739.18
- (d). Net worth, December 31, 1948. 115,732.01

4(e). The Government asserts that the defendant and his wife made the following expenditures:

\$20,336.23 in 1946.

27,591.28 in 1947.

36,520.72 in 1948.

4(f). The net worth of the defendant and his wife as of the following dates was composed of the

following-named items, the valuations of which are peculiarly within the knowledge of and best known to the defendant:

Assets	12/31/45	12/31/48
1. Cash on Hand and in Banks	x	x
2. Accounts Receivable		x
3. Notes and Mortgages Re- ceivable	x	x
4. Stocks and Bonds		x
5. Automobiles	x	x
6. Medical Equipment	x	x
7. Real Estate.....	x	x
Liabilities		
8. Mortgages Payable		x
9. Depreciation Reserve....	x	x
10. Checks Outstanding Close of Year	x	x

JACK D. H. HAYS,
United States Attorney.

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
FEBRUARY 8, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

Defendant's Motion for Bill of Particulars comes
on regularly for hearing this day. Robert O. Royle

ston, Esquire, Assistant United States Attorney, appears on behalf of the Government. No appearance is made by or on behalf of the defendant. On stipulation of counsel,

It Is Ordered that defendant's Motion for Bill of Particulars is stricken from the calendar subject to reinstatement by the defendant upon three days' notice to the United States Attorney.

MINUTE ENTRY OF TUESDAY,
SEPTEMBER 7, 1954

(Tucson Division)

Honorable James A. Walsh, United States District Judge, Presiding.

This case comes on regularly for trial this day. Robert O. Royston, Esq., Assistant United States Attorney, and Mary Anne Reimann, Esq., Assistant United States Attorney, appear for the Government. The defendant, Louis P. Lutfy, is present in person with his counsel, Darrell R. Parker, Esq.

Both sides announce ready for trial.

And thereupon, at 11:50 o'clock a.m., It Is Ordered that the further trial of this case be continued to two o'clock p.m., this date, to which time the jury, the defendant and counsel are excused.

Subsequently, at two o'clock p.m., the jury, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

The Jury of twelve persons is now duly empaneled and sworn to try this case.

Robert O. Royston, Esq., Assistant United States Attorney, now reads aloud the Indictment to the Jury and thereafter said counsel for the Government states to the Jury the defendant's plea of Not Guilty to said Indictment.

The said Assistant United States Attorney now states the Government's case, and thereafter, Darrell Parker, Esq., states the defendant's case to the Jury.

Government's Case

Hugh McGucken is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

1. Income Tax Return.
2. Income Tax Return.
3. Income Tax Return.
4. Income Tax Return.
5. Income Tax Return.
6. Certificate.
7. Income Tax Return.

The following Government's witnesses are now sworn and examined:

Anthony Duran.
Walter S. Alpert.
Joseph L. Schmitt.

Government's exhibit 8, file, is now admitted in evidence.

The following Government's witnesses are now sworn and examined:

Howard Linsenmeyer.

Walter S. Wilson.

It Is Ordered that Government's exhibit 9, envelope, marked for identification, be stricken from the record.

The following Government's witnesses are now sworn and examined:

Clarence J. Beale.

John M. Fairfield.

And thereupon, at 4:30 o'clock p.m., It Is Ordered that the further trial of this case be continued to Wednesday, September 8, 1954, at ten o'clock a.m., to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

MINUTE ENTRY OF WEDNESDAY,
SEPTEMBER 8, 1954
(Tucson Division)

Honorable James A. Walsh, United States District Judge, Presiding.

The Jury, and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Government's Case Continued:

Government's exhibit 12, Certificate and photographic copies, is now admitted in evidence.

Robert F. Herre is now sworn and examined on behalf of the Government.

Government's exhibit 13, Certificate, is now admitted in evidence.

Charles M. Wightman is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

14. Letter.

15. Deposit slip and photostat.

The following Government's witnesses are now sworn and examined:

Fred Donovan.

Pryor Day.

Government's exhibit 17, Ledger sheets, is now admitted in evidence only as to the years 1946, 1947 and 1948.

The following Government's witnesses are now sworn and examined:

Mrs. Margaret Larsen.

Hannah C. Stein.

Government's exhibit 18, Affidavit, is now admitted in evidence.

The following Government's witnesses are now sworn and examined:

Robert M. Foster.

Florence Ruppelius.

Government's exhibit 19, Cancelled Check, is now admitted in evidence.

Ernest R. Morris, Deputy Recorder of Maricopa County, is now sworn and examined on behalf of the Government.

Government's exhibit 20, Photostatic copy, is now admitted in evidence.

And thereupon, at 11:55 o'clock a.m., It Is Ordered that the further trial of this case be continued to two o'clock p.m. this date, to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at two o'clock p.m., the Jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued:

Clarence J. Beale, heretofore sworn, is now recalled and further examined on behalf of the government.

Government's exhibit 9, Envelope, is now admitted in evidence.

Philip Lantin is now sworn and examined on behalf of the government.

The following Government's exhibits are now admitted in evidence:

21. Cancelled check.

22. Cancelled check.

Harry C. Jones is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

23. Photostat.
24. Affidavit and certificate.
25. Affidavit and certificate.

The following Government's witnesses are now sworn and examined:

Leslie Madison.

Rae Way.

The following Government's exhibits are now admitted in evidence pursuant to stipulation of counsel:

28. Copy of Statement.
29. Stipulation of Facts.
30. Stipulation of Facts.
31. Stipulation of Facts.

And thereupon, at 4:30 o'clock p.m., It Is Ordered that the further trial of this case be continued to Thursday, September 9, 1954, at ten o'clock a.m., to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
SEPTEMBER 9, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

The jury, and all members thereof, the defendant
and all counsel are present pursuant to recess, and
further proceedings of trial are had as follows:

Government's Case Continued:

The following Government's witnesses are now
sworn and examined:

Clarence A. Westring.

Edward J. Bamrick.

Government's Exhibit 32, photostatic copy, is
now admitted in evidence.

And thereupon, at 11:45 o'clock a.m., It Is Or-
dered that the further trial of this case be continued
to 1:45 o'clock p.m., this date, to which time the
jury, being first duly admonished by the Court, the
defendant and counsel are excused.

Subsequently, at 1:45 o'clock p.m., the jury and
all members thereof, the defendant and counsel for
respective parties being present pursuant to recess,
further proceedings of trial are had as follows:

Government's Case Continued:

The following Government's exhibits are now
admitted in evidence:

26. Letterhead.

33. Net worth statement.

And thereupon, at 3:45 o'clock p.m., It Is Ordered that the jury, being first duly admonished by the Court, is excused until Friday, September 10, 1954, at ten o'clock a.m.

The jury having withdrawn from the courtroom, the defendant and all counsel being present, counsel for the defendant now moves that the trial of this case be continued for ten days. Said motion is duly argued by respective counsel, and

It Is Ordered that hearing on said motion for continuance is continued until Friday, September 10, 1954, at nine o'clock a.m., to which time the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
SEPTEMBER 10, 1954

Honorable James A. Walsh, United States District Judge, Presiding.

All counsel are present pursuant to recess, and

It Is Ordered that the Court's ruling on defendant's motion to strike the testimony as to depreciation and on defendant's motion for continuance of trial is reserved.

The jury, and all members thereof, and the defendant are present pursuant to recess, and further proceedings of trial are had as follows:

Government's Case Continued:

Government's Exhibit 34, computation, is now admitted in evidence.

Howard H. Whitsett, heretofore sworn, is now recalled and further examined on behalf of the Government.

Julia Sprague is now sworn and examined on behalf of the Government.

Government's Exhibit 27, photostats, is now admitted in evidence.

And thereupon, at twelve o'clock noon, It Is Ordered that the further trial of this case be continued to two o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at two o'clock p.m., the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued:

Howard H. Whitsett, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit 36, photostat, is now admitted in evidence.

Whereupon, the Government rests.

And thereupon, at 4:10 o'clock p.m., It Is Ordered that the jury, being first duly admonished by the Court, is excused until Tuesday, September 14, 1954, at ten o'clock a.m.

The jury having withdrawn from the courtroom, the defendant and all counsel being present, counsel for the defendant now moves for a directed verdict.

Said motion is duly argued by respective counsel.

The Court reserves ruling on defendant's motion to strike from evidence all evidence relating to "Net Worth Theory" should defendant's motion for a directed verdict be denied.

It Is Ordered that the further trial of this case be continued to Tuesday, September 14, 1954, at 9:30 o'clock a.m., to which time the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF TUESDAY,
SEPTEMBER 14, 1954

Honorable James A. Walsh, United States District Judge, Presiding.

At 9:30 o'clock a.m., Robert O. Royston, Esquire, Assistant United States Attorney, and Mary Anne Reimann, Esquire, Assistant United States Attorney, are present for the Government. The defendant is present in person with his counsel, Darrell Parker, Esquire, and

It Is Ordered that defendant's motion for judgment of acquittal is denied, and It Is Further Ordered that defendant's motion to proceed without the "Net Worth Theory" is denied.

Thereupon, at ten o'clock a.m., the jury, and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendant's Case

Bertha A. Lutfy is now sworn and examined on behalf of the defendant.

The following defendant's exhibits are now admitted in evidence:

- C. Certified copy Inventory and Appraisment.
- D. Certified copy Western Union Money Order.
- E. Letter.
- F. Copy of Letter.

Counsel now stipulate that if Otto Linsenmeyer were called to testify his testimony would be substantially the same as that of Howard Linsenmeyer.

And thereupon, at 11:50 a.m., It Is Ordered that the further trial of this case be continued to two o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at two o'clock p.m., the jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

The following defendant's witnesses are now sworn and examined:

N. Clyde Pierce.

R. Dale Moser.

The following defendant's exhibits are now admitted in evidence:

- G. Net Worth Statement.
- H. Schedule.
- I. Cancelled check.

Nadine M. Patterson is now sworn and examined on behalf of the defendant.

And thereupon, at 4:25 o'clock p.m., It Is Or-

dered that the further trial of this case be continued to Wednesday, September 15, 1954, at ten o'clock a.m., to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
SEPTEMBER 15, 1954

(Tucson Division)

Honorable James A. Walsh, United States District
Judge, Presiding.

The Jury, and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Defendant's Case Continued:

R. Dale Moser, heretofore sworn, is now recalled and further examined on behalf of the defendant.

And thereupon, at 12:00 o'clock noon, It Is Ordered that the further trial of this case be continued to 2:00 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at 2:00 o'clock p.m., the Jury and all members thereof, the defendant and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case Continued:

The following witnesses are now sworn and examined on behalf of the defendant:

C. W. Pensinger,
Temple F. Penrod,
Arthur Lee Phelps,
Father Thomas V. Savage.

Counsel for the defendant renews his motion for judgment of acquittal.

And the defendant rests.

Both sides rest.

And thereupon, at 2:40 o'clock p.m., It Is Ordered that the Jury, being first duly admonished by the Court, is excused until Thursday, September 16, 1954, at 9:00 o'clock a.m.

The Jury having withdrawn from the Courtroom, the defendant and all counsel being present, counsel for the defendant renews defendant's motion for judgment of acquittal.

The Court reserves ruling on said motion, and

It Is Ordered that the further trial of this case be continued to Thursday, September 16, 1954, at nine o'clock a.m., to which time the defendant and counsel are excused.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
SEPTEMBER 16, 1954

Honorable James A. Walsh, United States District Judge, Presiding.

The Jury, and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

All the evidence being in, the case is argued by respective counsel to the Jury. Whereupon, the Court duly instructs the Jury and said Jury retire at 12:05 p.m. in charge of a sworn bailiff to consider of their verdict.

It Is Ordered that the Marshal provide meals for said Jury and their bailiffs during the deliberation of this case at the expense of the United States.

Subsequently, the defendant and all counsel being present, the Jury return in a body into open Court at 2:40 o'clock p.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to wit:

C-14525 Tucson

UNITED STATES OF AMERICA,

Plaintiff,

Against

LOUIS P. LUTFY,

Defendant.

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Louis P. Lutfy, Guilty as charged in Count One; Guilty as charged in Count Two; Guilty as charged in Count Three; Guilty as charged in Count Four; Guilty as charged in Count Five.

FRANK B. ROE,

Foreman.

It Is Ordered that the Jury is discharged from the further consideration of this case and excused until further order.

It Is Further Ordered that this case is set for sentence on Monday, October 11, 1954, at 10:00 o'clock a.m. and that said defendant be released upon his present bond until said date.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Louis P. Lutfy, Guilty as charged in Count One; Guilty as charged in Count Two; Guilty as charged in Count Three; Guilty as charged in Count Four; Guilty as charged in Count Five.

/s/ FRANK B. ROE,
Foreman.

[Endorsed]: Filed September 16, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the above-named defendant, by his attorneys undersigned, and respectfully moves the above-entitled Court that an order be made and en-

tered herein granting a new trial in this cause for the reasons and upon the grounds following:

1. That the Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's evidence.

2. That the Court erred in denying defendant's motion for acquittal made at the conclusion of all of the evidence in the case.

3. The jury's verdict is not supported by substantial evidence.

4. That the verdict of the jury is contrary to the weight of the evidence.

5. That the Court erred in failing to grant defendant's motion to strike all evidence of the Government relating to defendant's net worth.

6. That the Court erred in submitting the case to the jury upon the Government's net worth theory for the reason that the cause was not an appropriate one for the application of the net worth method of computation, and for the further reason that the Government failed to prove by competent evidence two essential elements relating to defendant's net worth at the beginning of the period involved, namely:

(a) Cash on hand, including uncashed checks on hand; and

(b) Cash values of life insurance in force at the beginning of the said period.

7. That the Court erred in submitting the cause to the jury upon the Government's net worth theory for the reason that the Government failed to establish that all monies available to defendant for expenditure during the period in question, that is, from December 31, 1945, to December 31, 1948, was derived from taxable sources; and, on the contrary, defendant proved without contradiction that substantial sums which became available to him during said period were from non-taxable sources.

8. That the Court erred in overruling objections to the introduction of evidence relating to defendant's depreciation schedules for the prosecution years, for the reason that the same were outside the scope and contrary to the specifications contained in the Government's Bill of Particulars, as amended, and the Government's supplement thereto entitled "Government's Reply to Defendant's Motion for Further Particulars," upon the principle that the inclusion of the specific excludes the general.

9. That the Court erred generally in overruling defendant's objections seeking to limit Government's evidence to the scope of the Bill of Particulars, amendment and supplement thereto.

10. That the Court erred specifically in its refusal to direct a verdict at the conclusion of the Government's evidence for the reason that the Government had produced no competent testimony independently of the claimed admission of the defendant respecting the amount of cash on hand at the beginning of the net worth period, and for the further

reason that the amount claimed by the Government to have been cash on hand at the beginning of the said period was obviously and on its face an arbitrary figure.

11. That the Court erred to the prejudice of the defendant in overruling defendant's objections to testimony pertaining to the making of tax returns and the payment or nonpayment of taxes over a long period of years preceding 1945, including the admission, over objection, of Government's Exhibits No. 6 and No. 13 in evidence.

12. That the Court erred to the prejudice of the defendant in overruling defendant's objections to Government's Exhibit No. 10 in evidence.

13. That the Court erred in admitting in evidence, over defendant's objection, Government's Exhibit No. 27, being the depreciation work sheet, for the reason that the same was not within the Bill of Particulars and amendments thereto.

14. That the Court erred in admitting into evidence Government's Exhibit No. 33, being the Government's net worth statement, for the reason that said cause was not an appropriate case for the application of the net worth formula.

Dated this 20th day of September, 1954.

PARKER & MUECKE,

By /s/ DARRELL R. PARKER,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 20, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
SEPTEMBER 20, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

It Is Ordered that defendant's motion for an order authorizing the defendant to supplement the grounds for a new trial is granted and that the defendant have until the close of business on October 5, 1954, within which to file supplemental grounds in support of defendant's motion for new trial.

It Is Further Ordered that the order heretofore entered setting this case for sentence on October 11, 1954, is vacated and that this case is reset for sentence on Monday, October 18, 1954, at ten o'clock a.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
OCTOBER 18, 1954
(Tucson Division)

Honorable James A. Walsh, United States District
Judge, Presiding.

This case comes on regularly this day for hearing on defendant's Motion for a New Trial and for sentence. Robert O. Royston, Esquire, Assistant United States Attorney, and Mary Anne Reimann, Esquire,

Assistant United States Attorney, appear on behalf of the Government. The defendant is present in person with his counsel, Darrell Parker, Esquire.

Defendant's Motion for a New Trial is submitted by counsel for the defendant, and

It Is Ordered that said motion is denied.

The defendant is now afforded an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment, and thereupon no legal cause appearing why judgment should not now be imposed, the Court renders judgment herein.

In the District Court of the United States
for the District of Arizona

No. C-14525 Tucson

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS P. LUTFY,

Defendant.

JUDGMENT AND COMMITMENT

On this 18th day of October, 1954, came the attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and verdict of

Guilty of the offense of violating Title 26, United States Code, Section 145(b), attempt to defeat and evade income tax, as charged in Counts 1, 2, 3, 4 and 5 of the Indictment herein.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) months on Count One and eight (8) months on each of Counts Two, Three and Four, said terms of imprisonment to run concurrently with each other and with the sentence imposed on Count One; and fined in the sum of \$5,000.00 on Count Five.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Dated at Tucson, Arizona, October 18, 1954.

/s/ JAMES A. WALSH,
United States District Judge.

[Endorsed]: Filed and docketed October 18, 1954.

[Title of District Court and Cause.]

ORDER GRANTING STAY OF EXECUTION
AND ADMITTING TO BAIL ON APPEAL

Defendant herein having filed notice of appeal from the jury's verdict and judgment and sentence of this Court, and it appearing to the Court that probable cause exists for such appeal, and the Court finding good cause why said defendant should be admitted to bail pending the final disposition of such appeal;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed staying the execution of the sentence imposed upon the said defendant on October 18, 1954, and admitting the defendant to bail pending final disposition of his appeal herein, and directing that defendant furnish or file herein a bond, in cash or otherwise, conditioned in the usual manner in such cases, in the amount of Five Thousand and no/100 Dollars, and that upon the furnishing of such bond the said defendant be at liberty until final disposition of his said appeal.

Dated this 18th day of October, 1954.

/s/ JAMES A. WALSH,
Judge.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Clerk of the United States District Court
for the District of Arizona:

You Are Hereby Notified that Louis P. Lutfy, defendant in the above-entitled cause, residing at 125 East Missouri Avenue, in the City of Phoenix, County of Maricopa, State of Arizona, by and with his attorney, Darrell R. Parker, residing at 713 West Palm Lane, in the said City of Phoenix, County of Maricopa, State of Arizona, and having offices at 310 Luhrs Tower, in the said City of Phoenix, County of Maricopa, State of Arizona, undersigned, hereby gives notice of appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from the verdict of the jury made and rendered herein on September 17, 1954, finding the defendant guilty as charged in Counts I, II, III, IV and V of the Indictment herein, and the order denying defendant's Motion for a New Trial entered herein on October 18, 1954, and the judgment rendered thereon on October 18, 1954, by the United States District Court for the District of Arizona imposing the following sentence, to wit: 8 months on each count (concurrent) and \$5,000.00 fine.

General Statement of Offense: (Using tax computations testified to by Revenue Agent upon the trial of the cause which were substantially less than

the amounts alleged in the various Counts of the Indictment):

Count I—filing false and fraudulent income tax return for the year 1946 on his own behalf showing tax due \$248.88, whereas the amount owing was \$1,073.57.

Count II—filing false and fraudulent income tax return on behalf of his wife, Bertha A. Lutfy for the calendar year 1946 showing tax due \$153.88, whereas the amount actually due was \$950.70.

Count III—filing false and fraudulent income tax return on his own behalf for the calendar year 1947, showing tax owed \$626.03, whereas the amount actually owed was \$2,471.42.

Count IV—filing false and fraudulent income tax return of defendant's wife, Bertha A. Lutfy, for the calendar year 1947 showing amount of tax owing \$521.53, whereas the amount actually owed was \$2,309.92.

Count V—filing false and fraudulent joint income tax return covering income of defendant and his wife, Bertha A. Lutfy, for the calendar year 1948, showing amount of tax owed \$3,265.36, whereas the amount of tax actually due was \$6,362.20; all in violation of Section 145(b), Internal Revenue Code; U. S. C. Sec. 145(b).

The present place of confinement of the said defendant is.

Dated this 18th day of October, 1954.

/s/ LOUIS P. LUTFY,
Defendant;

/s/ DARRELL R. PARKER,
Attorney for Defendant.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

CRIMINAL DOCKET

Proceedings

1953

* * *

Mar. 12 Deposit \$2,000 deft's. cash bail in Registry Fund.

* * *

1954

Oct. 18 Deposit \$3,000.00 cash bail in Registry Fund pending appeal.

* * *

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
NOVEMBER 18, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

It Is Ordered that the time to file the record on
appeal herein with the United States Court of Ap-

peals for the Ninth Circuit at San Francisco, California, is extended to and including Tuesday, January 4, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKET-
ING APPEAL AND TRANSMITTING
RECORD

Upon motion of counsel for the above-named defendant-appellant:

It Is Ordered that appellant's time for filing the transcript of record on appeal herein and docketing said proceeding in the United States Court of Appeals for the Ninth Circuit be, and it is hereby, extended to and including January 17, 1955.

Done in Open Court this 15th day of December, 1954.

/s/ JAMES A. WALSH,
Judge.

[Endorsed]: Filed December 15, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
DEFENDANT-APPELLANT RELIES ON
APPEAL

The points upon which Defendant-Appellant relies in this Appeal are as follows:

1. The District Court erred in the admission of evidence concerning defendant's net worth over the

period of prosecution, for the reason that defendant by the undisputed testimony of witnesses kept and maintained in said period a regular set of books and the employment of the net worth method of computation was improper and without authority of law, with the consequence:

A. That the District Court erred in denying defendant's Motion for Judgment of Acquittal at the conclusion of the Government's evidence.

B. That the District Court erred in denying the defendant's Motion for Judgment of Acquittal at the conclusion of all the evidence in the case.

C. That the District Court erred in denying defendant's Motion to Strike all of the Government's evidence and exhibits relating to defendant's net worth.

D. That the District Court erred in submitting the case to the jury upon the Government's net worth theory of computation.

E. That the District Court erred specifically in admitting into evidence the Government's Exhibit 33, being the Government's net worth statement.

2. That the District Court erred in denying defendant's Motions for Judgment of Acquittal and in submitting the case to the jury upon the "net worth theory," for the reason that the Government failed to prove by competent evidence certain essential elements relating to defendant's net worth at the beginning of the prosecution period and during same.

A. Cash on hand at beginning of period including uncashed checks on hand.

B. Cash values of life insurance in force at the beginning of the said period and at the end of the last of the prosecution years.

C. Funds received by defendant during prosecution years in the form of gifts; that in this connection the Government failed to establish that all monies available to defendant for expenditure during the period in question, that is, December 31, 1945, to December 31, 1948, was derived from taxable sources; and, on the contrary, defendant proved without contradiction that substantial sums which became available to him during said period were from non-taxable sources.

3. That the District Court erred generally in overruling defendant's objections seeking to limit the Government's evidence to the scope of the Bill of Particulars, Amendment and Supplement thereto:

A. That the District Court erred in overruling objections to the introduction of evidence relating to defendant's depreciation schedules for the prosecution years, for the reason that the same were outside the scope of the specifications contained in the Government's Bill of Particulars as amended and supplemented upon the principle that the exclusion of the specific excludes the general.

B. That the District Court erred in admitting in evidence, over defendant's objection, Government's Exhibit No. 27, being a depreciation work

sheet, for the reason that the same was not within the Bill of Particulars and Amendments and Supplements thereto.

4. That the District Court erred to the prejudice of the defendant and thereby deprived defendant of a fair trial by:

A. Admitting in evidence, over defendant's objection, Government's Exhibit No. 6, being the assessment list and/or record of tax payments covering a long period of years prior to years involved in the indictment.

B. That the District Court erred to the prejudice of the defendant in admitting in evidence, over defendant's objection, Government's Exhibit No. 13, being an assessment and payment record of defendant covering a period of years long prior to the prosecution years.

C. That the District Court erred in admitting in evidence, over defendant's objection, Government's Exhibit No. 7, being defendant's 1945 income tax return.

D. That the District Court erred in admitting in evidence, over objection, Government's Exhibit No. 10, being ledger sheet of old bank account of defendant in Bank of Arizona many years prior to years involved in the prosecution.

Dated this 22nd day of October, 1954.

/s/ DARRELL R. PARKER,
Attorney for Defendant.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF MONDAY,
JANUARY 10, 1955

Honorable James A. Walsh, United States District
Judge, Presiding.

It Is Ordered that the time for docketing the record on appeal herein with the United States Court of Appeals for the Ninth Circuit at San Francisco, California, is extended to and including Tuesday, February 1, 1955.

In the District Court of the United States
for the District of Arizona

No. C 14525—Tucson

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS P. LUTFY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:

Mr. Robert Royston, Assistant United States Attorney, and Miss Mary Anne Reimann, Assistant United States Attorney, for the plaintiff.

Mr. Darrell Parker, for the defendant.

The above-entitled case came on for trial on the 7th day of September, 1954, in the District Court of the United States for the District of Arizona, at Tucson, Arizona, before the Honorable James A. Walsh, Judge, and a Jury and the following proceedings were had, to wit:

HUGH McGUCKIN,
called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston

* * *

Q. (By Mr. Roylston): Mr. McGuckin, did you bring a certificate of assessments and payments certified to by the District Director of Internal Revenue?

A. Yes.

Q. These are certified to by the Acting District Director of Internal Revenue, is that correct?

A. That is right.

Mr. Roylston: Would you mark those for identification, please. They can all be marked as one.

(Government's Exhibit 6 marked for identification.)

Mr. Roylston: I offer Government's Exhibit 6 for identification which is a certified copy, certified to by the Acting District Director of Internal Revenue. I offer that in evidence. [3*]

Mr. Parker: If your Honor please, with refer-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Hugh McGuckin.)

ence to this offered Exhibit 6 for identification, which consists of three sheets, I will confess to the Court I am unable to see the materiality of two of the sheets. The last one appears to have some relevancy but the balance of the Exhibit I object to upon the ground it is irrelevant to any issue in this case.

The Court: You have no objection to the last sheet, Mr. Parker?

Mr. Parker: No, your Honor, I see the relevancy of the last sheet.

Mr. Royston: The first two sheets are offered as evidence tending to establish a starting point to establish the defendant's net worth.

Mr. Parker: If your Honor please, I am aware of that, I think the Court is too, but I think it is very poor evidence. During that time, as your Honor knows, the law was changed several times and it may or may not be of much probative value. Certainly there would be a more direct and far better way to get at it and I persist in my objection of the first two sheets.

The Court: Well, it will be admitted. [4]

* * *

Q. (By Mr. Royston): Referring to Government's Exhibit 6 in evidence, on the first page of that document after the years 1929 through 1933 are the initials "N.C." Would you explain what those initials mean, Mr. McGuckin?

A. That means no return filed.

(Testimony of Hugh McGuckin.)

Q. It means what? A. No return filed.

Q. No return was filed? [5]

A. It means no cards——

Mr. Parker: If your Honor please, this is not relevant to any issue in this case and goes back years and years before. I move the Court that the last answer be stricken and that the jury be admonished to disregard it and I again reiterate that I sincerely believe these matters are very far afield from the issues in this case.

The Court: The objection will be sustained. The answer of the witness to the last question will be stricken and the jury will disregard it.

Mr. Royston: That is all.

Cross-Examination

By Mr. Parker:

Q. Did I understand you are stationed at the Tucson office of the Internal Revenue Service?

A. Starting today.

Q. Heretofore you have been in Phoenix?

A. Yes.

Q. What is your title, do you have a title?

A. My present title is Deputy Collection Officer.

Q. Deputy Collection Officer?

A. Collection Officer.

Q. That is not the same as Deputy Collector?

A. That is the new name for Deputy Collector.

Q. The title now is officially Director of Internal Revenue, isn't it, instead of Collector? [6]

A. That is right.

(Testimony of Hugh McGuckin.)

Q. You are not the first assistant to the Director?

A. No. I have a letter from the Director permitting me to be here in his place.

Q. I understand that you are here by his request?

A. Yes. [7]

* * *

HOWARD LINSENMEYER,
called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Royston: [20]

* * *

Q. You are a brother to Mrs. Lutfy, Bertha Lutfy?

A. That is correct.

Q. You have known the doctor for some matter of years then, is that correct?

A. Yes, I have.

Q. Do you know approximately how long your sister has been married to Dr. Lutfy?

A. In the neighborhood of sixteen years.

Q. I will ask you—will you state your mother's name?

A. Otilia Linsenmeyer.

Q. Is your mother presently living?

A. No, she died in 1951.

Q. She is also the mother of Bertha, you are full brother and sister?

A. Yes.

Q. Will you state of your own knowledge whether you know of any gifts being given by your mother to the sister Bertha during the period 1946, 1947 and 1948?

(Testimony of Howard Linsenmeyer.)

A. You mean material gifts——

Q. Any gifts of property, money or cash, anything along that line?

Q. Well, I know my mother gave each of us children \$100 on our birthday; and I believe it was in 1946 she gave five of us children an undivided one-fifth interest in approximately five acres of ground at 16th Street and Roosevelt [21] in Phoenix. [22]

* * *

Cross-Examination

By Mr. Parker:

Q. When did your mother die?

A. In 1951.

Q. And how many children did your mother have surviving?

A. There were eight of us children and one sister was killed in an automobile accident in 1935, I believe.

Q. And there were seven then surviving at the time of your mother's death?

A. That is correct.

Q. Do you recollect the size estate your mother left upon her death?

Mr. Royston: I object to that as immaterial if it was in 1951.

The Court: He may answer.

A. The government appraisal on it for inheritance tax purposes, it was roughly \$900,000.

Q. Was that estate distributed entirely to you children, the seven children?

(Testimony of Howard Linsenmeyer.)

A. That is correct.

Q. Now, Mr. Linsenmeyer, had your mother had most of this money and property for a number of years prior to her death?

A. Well, my father accumulated all of it then my mother [23] held it together.

Q. And she held it together from the date of his death in the early thirties until her death in 1951?

A. That is correct.

Q. Mr. Linsenmeyer, do you recollect that your mother was in the habit of having large amounts of cash available most of the time from rentals and securities and other sources?

A. Well, I didn't know much of my mother's personal business but I would presume that she did have rentals and one thing and another around the house.

Q. Do you recollect that after her death that rentals appeared there in the estate of something like \$40,000 a year?

A. That is correct. [24]

* * *

Q. Do you know of your own knowledge that over the years and particularly the years '45, '46, '47, and '48 that she followed that practice in order to avoid friction in the family between the children?

A. Well, that is true, yes.

Q. Then you in accordance with that practice which your mother followed you would not ordinarily be told by her of the gifts she may have made to your sister, Bertha, would you?

(Testimony of Howard Linsenmeyer.)

A. No, I would have no way of knowing.

Q. So when you testified that you knew of no sizeable gifts, that simply means you have no knowledge of any sizeable gifts?

A. That is correct.

Q. You are not suggesting to the Court or jury that there may not have been sizeable gifts, are you, Mr. Linsenmeyer?

A. No. [25]

* * *

CLARENCE J. BEALE

called as a witness herein, having been first duly sworn, testified as follows: [31]

Direct Examination

By Mr. Royston:

Q. State your name, please.

A. Clarence J. Beale.

Q. Where are you employed, Mr. Beale?

A. At this time?

Q. Yes, sir, at the present time?

A. I am employed by Verde Exploration Limited, Jerome, Arizona.

Q. And how long have you been employed at Verde Exploration Limited?

A. Since their company was created along about 1947, first of the year I think it was created.

Q. And what type work do you do in connection with that company, Mr. Beale?

A. I am assistant treasurer and Arizona agent.

(Testimony of Clarence J. Beale.)

Q. And in your employment do you have custody of the company records?

A. All of the previous companies, two of them, the old United Verde Extension and the Clemenceau Mining Corporation, which took over the Extension, then we took over from them. All the records are now in our possession, everything.

Q. You are the custodian of those records, is that correct?

A. Yes, sir, I am.

Q. Are these the records here of that company? Can you tell from there without examining them any closer? [32]

A. That is right.

Q. You brought these into Court?

A. That is right. There are sections of the mine and smelter payrolls of the old United Verde Extension Mining Company during the period approximately when Dr. Lutfy was one of our company doctors.

Q. I will ask you whether or not you examined these records and prepared any document from the records?

A. Yes. I left it there in my seat.

Mr. Parker: If your Honor please, I am under the impression this relates to a period almost twenty years ago and if I am not in error on that I am a total loss to understand its relevancy. If I might ask the witness a question voir dire I think we might get at that point.

The Court: I take it, Mr. Parker, if what you say be true it is all part of the effort to build up a starting net worth.

Mr. Parker: Your Honor, a net worth would

(Testimony of Clarence J. Beale.)

have to be found in terms of tangible property as of the beginning of the period. Now, how this sort of thing could be of any relevancy at all is very difficult for me to understand. We have entered into a very extensive stipulation here concerning certain properties which were owned by the defendant in 1944, '45, and so forth, and this thing seems to me to be so much more remote and indirect than the stipulation which has already [33] been signed and filed in this case. I don't understand it. If we didn't have tangible property about which we have quite freely stipulated——

The Court: I don't understand there is any stipulation.

Mr. Parker: We admit we stipulated to everything the government has asked for regarding tangible property that I know of.

Mr. Roylston: We couldn't get a stipulation as to cash on hand in order to establish the starting point of net worth.

Mr. Parker: The point of it is, what Dr. Lutfy made in the form a salary for the U.V.X. eighteen or twenty years ago wouldn't have very much bearing on how much money he had in his pocket on December 31st, 1945.

Mr. Roylston: If we could reach a stipulation as to cash on hand——

Mr. Parker: The only reason we can't is because we don't know. At one time we were guessing in terms of \$500 and it was purely arbitrary. We have

(Testimony of Clarence J. Beale.)

no more basis—if you could give us a basis or we could give you a basis we would agree with you, but we don't know. That is purely speculative.

Mr. Royston: That is what I am doing now.

Mr. Parker: You are not going to do that this way, I assume. [34]

The Court: I don't think there would be any dispute but what this wouldn't prove it, but it may be a part of an entire picture.

Mr. Parker: I don't want to obstruct the Government's case but it seems so extremely remote and far fetched and of little or no probative value. It would have to be bulwarked by a whole lot of collateral proof to give it any probative value whatsoever. I might have made \$500 a month or \$200 a month two years ago and maybe I didn't keep it long enough to warm it up in my pants pocket, but the fact that I made it wouldn't prove a thing as to how much I had in terms of property in 1945 or '46.

The Court: Well, we will pass on it when it comes up.

Mr. Parker: All right.

Q. (By Mr. Royston): These documents you have in your hands now, where did you obtain those documents, sir?

A. Where did I obtain them?

Q. Yes.

A. In the files of the present company.

Q. That was obtained from these records over here?

A. This recapitulation here, after I dug those

(Testimony of Clarence J. Beale.)

payrolls out, all five hundred pounds of payrolls piled up there, I took those sections out. The purpose of that which I have recapitulated here is to show the amount of money that was paid to Dr. Lutfy for medical services to our employees [35] over and above what they were entitled to by payment of a monthly fee. And that is what the record shows, that card on the front shows what his salary was during those periods.

Mr. Roylston: Would you mark this as an Exhibit, one Exhibit, the contents of this envelope?

The Witness: It is Dr. Lutfy's card. I brought these along to show it is one of all of them.

(Government's Exhibit 9 marked for identification.)

Q. (By Mr. Roylston): You stated this was taken from the records of the mining company up there, is that correct? A. That is right.

Q. That was taken from these records which are lying on the table?

A. The deductions which I have recapitulated there were taken from those payroll records showing what was deducted from the various employees for his account.

Q. These items listed here were taken from the company records? A. That is right.

Mr. Roylston: Then I offer Government's Exhibit 9 for identification into evidence, if it please the Court.

(Testimony of Clarence J. Beale.)

Mr. Parker: I should like, your Honor, to ask Mr. Beale a few questions on voir dire.

The Court: Very well.

Q. (By Mr. Parker): Mr. Beale, these records here refer [36] to certain income from the mining company, do they not?

A. Those typewritten figures?

Q. Well, the typewritten figures as I understand it are certain deductions from employee's wages where they received medical services or surgical services over and above what they would be entitled to for their regular——

A. That is right.

Q. ——deductions?

A. I simply took those figures right off of those payrolls.

Q. Then on this top card there is an indication what Dr. Lutfy's salary was in a period 1934 and '35?

A. That is right.

Q. From the mining company?

A. That is right. That is his salary.

Q. Yes, that was salary. Now, as I understand it he was also employed by the smelter?

A. Well, that card showing what his salary was covers the period when I think the doctor went down to our smelter medical office at the start and later came up and took over in Jerome. That card refers to his total employment, whether at the mine or the smelter. In other words, they change back and forwards those doctors. It was no consequence where they happened to be parked, whether at Jerome or in Clemenceau.

(Testimony of Clarence J. Beale.)

Q. Did he also practice medicine privately in addition to his employment with the companies? [37]

A. I would have no knowledge of that.

Q. You were there at the time and you remember him, don't you?

A. Oh, yes. I contacted the doctor very often.

Q. He was there about how long?

A. Well, apparently that record, from September I think until the following—approximately a year I would think, whatever the record shows there.

Q. This all occurred in 1934 and '35?

A. That is right.

Q. Almost twenty years ago?

A. That is right.

Q. Do you know whether or not he had a salary from the county, from Yavapai County?

A. I couldn't answer that. No, I do not.

Q. Do you know whether he had any income from the State School Board or State Board of Education?

A. No, I have no knowledge of it.

Q. Your position there at the time Dr. Lutfy was in Jerome was what, Mr. Beale?

A. Well, I did the hiring and handled the personal injury cases of the two townsites and other odd jobs that nobody else wanted. And in that connection with the personal injury cases I saw the doctor almost daily.

Q. Did you keep the payroll at that time? [38]

A. I had supervision over the time office also but I didn't actually work on the payroll, but I had

(Testimony of Clarence J. Beale.)

one general clerk and one who took care of the payroll. A timekeeper checked the men on and off and there was a boy there that helped with the rental cards and pitched in on the payroll, but I never worked on the payroll myself.

Q. Were you in charge, for instance, of paying Dr. Lutfy, did you have anything to do with that?

A. No. The doctor was on a salary and for some reason the management saw fit to keep a small payroll of, oh, the mine superintendent, smelter superintendent and chief surgeon and the other doctors. In my own case sometimes they had me on it, sometimes they had my name on the main payroll along with everybody else. I don't know what the purpose was. That payroll has been lost. I searched high and low and I couldn't find it. However, those cards very clearly indicate what the salary was the doctor received.

Q. If I understand, you had no duties with reference to making any records or keeping any records of Dr. Lutfy's pay or his salary or fees?

A. No. As I say, he was kept on this little payroll which was kept in the main office by the cashier or bookkeeper or office manager.

Mr. Parker: If it please the Court, I still fail to see the materiality of it and at the present time I doubt the [39] competency of it for want of proper identification.

The Court: May I see it, please?

Q. (By the Court): Mr. Beale, what you have in those rolls there, are those all of the payroll

(Testimony of Clarence J. Beale.)

records for all of the mining company employees during the period '34, '35, and '36?

A. Those sections of both of the mine and the smelter which are divided there cover all the period of all the employees except the Dr. Lutfy and, as I say, a few salaried men; and I simply took out the individual sheets and all the sheets for any given month showed a deduction from an employee in favor of Dr. Lutfy.

Q. The only sheets you have in those rolls are the ones you found that showed a deduction on behalf of Dr. Lutfy?

A. That is right.

Q. The others are——

A. They are all there in the vault at home. Of course they are irrelevant as far as the showing the deductions for Dr. Lutfy and weigh several hundred pounds. Naturally I didn't pack the whole works down here.

The Court: Are you offering this, Mr. Royston?

Mr. Royston: I might ask one further question.

Q. (By Mr. Royston): The card that is on the front there, the little white card, that was a card kept in the regular course of business of the mine up there? [40]

A. That was kept, and I recognize the handwriting or figuring on it of a man named Smith who was office manager, cashier and head of the main office. I was exchanging reports with him daily over twenty odd years, I know his figures. I know he made that record. As I look through these I recognize lots of others kept by him and some by

(Testimony of Clarence J. Beale.)

others I wouldn't attempt to identify them all but I know Smith kept that record.

Q. In the regular course of business there at the mine?

A. Regular course of business, certainly, and it is just as good an indication—you know the doctor didn't work there that period without being paid whether I have the payroll or not.

Mr. Roylston: I offer that Exhibit 9 for identification into evidence, your Honor.

The Court: Were there some records concerning a fellow named Hilton——

A. He was another doctor.

The Court: Somebody named Kirkland.

A. He was the chief surgeon.

Mr. Roylston: If those may be removed?

The Court: When I can examine this further I will rule on it then.

Mr. Roylston: No further questions.

Mr. Parker: That is all. [41]

JOHN L. FAIRFIELD

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston:

Q. State your name, please.

A. John L. Fairfield.

Q. What is your occupation, Mr. Fairfield?

(Testimony of John L. Fairfield.)

A. I am manager of the Verde Valley Branch of the Bank of Arizona located at Cottonwood, Arizona.

Q. How long have you been so employed?

A. I have been employed with the Bank of Arizona since January 2nd, 1945; I have been manager for a little over three years of that office.

Mr. Royston: Could I have this record you brought with you, would you mark that for identification, please?

(Government's Exhibit 10 marked for identification.)

Q. (By Mr. Royston): Referring to this Government's Exhibit 10 for identification I will ask you where you obtained that document, Mr. Fairfield?

A. From our records which we have. Perhaps I should go back a little. This record, this account was maintained with the Bank of Arizona at Clarkdale, however, January 25th of this year all the branch bank in that area was moved to Cottonwood and all these records are now stored, some in Cottonwood and some in Clarkdale where we still have a facility. [42]

Q. This was a record then of the bank——

A. At Clarkdale.

Q. At Clarkdale? A. That is right.

Q. By examining that document can you state whether or not that was a record kept in the regular course of business there at the bank?

(Testimony of John L. Fairfield.)

A. Yes, all ledger sheets are permanent records.

Q. It was there in the custody of the bank at the time you obtained it, is that correct? A. Yes.

Mr. Royston: I offer Government's Exhibit 10 for identification into evidence.

Voir Dire Examination

By Mr. Parker:

Q. Mr. Fairfield, have you examined this Exhibit that is now being offered, closely?

A. Just casually in getting it from our records.

Q. You observed it is just a small checking account, did you not? A. That is true.

Q. Of course you would have no way of knowing whether or not Dr. Lutfy at the time he maintained this account did most of his business with the Phoenix bank? A. I would not know. [43]

Q. You have made no investigation to determine if he had other bank accounts at the same time this small checking account existed?

A. I have not.

Mr. Royston: I offer Government's Exhibit 10 for identification into evidence.

Mr. Parker: For the sake of the record I would like to preserve the objection for relevancy that was previously made.

The Court: Might I see it, please?

Mr. Parker: Also the objection predicated upon lack of a complete foundation and lack of probative

(Testimony of John L. Fairfield.)

value as far as any issues in this case are concerned. I might call your Honor's attention to the fact it is obvious this bank account does not correspond even to the income which Dr. Lutfy had during that period.

The Court: It will be admitted for whatever it may be worth. [44]

* * *

ROBERT F. HERRE

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston:

Q. Your name is Robert F. Herre?

A. Robert F. Herre.

Q. What is your occupation, Mr. Herre?

A. I am a special agent for the Bureau of Internal Revenue.

Q. Would you speak just the least bit louder. Where are you stationed at the present time?

A. St. Louis. [50]

Q. How long have you been stationed at St. Louis? A. Since the Spring of 1948.

Q. In connection with your work as an agent of the Internal Revenue, Bureau of Internal Revenue, did you have occasion to conduct any investigation in relation to Dr. Lutfy? A. I did.

Q. And when was this investigation conducted?

(Testimony of Robert F. Herre.)

A. During the latter part of 1953 and first half of 1954.

Q. Who directed you to conduct any investigation?
A. The special agent, Lloyd Tucker.

Q. What general type of investigation were you to conduct?

A. A searching investigation, the files of the Director's office at St. Louis were searched for filing of income tax returns in the case of Lutfy.

Q. Did you conduct that search yourself?

A. I did.

Q. And do you have a certificate of assessments and payments?
A. I do.

Mr. Royston: May this be marked?

(Government's Exhibit 13 marked for identification.)

Mr. Royston: This Government's Exhibit 13 headed Certificate of Assessments and Payments, certified to by the Assistant District Director of Internal Revenue, I will offer [51] in evidence at this time.

Mr. Parker: If your Honor please, does the Court have a copy of this?

The Court: I think I have the original. I think you have the copy.

Mr. Parker: I am reluctant to suggest that we are now approaching the ridiculous. This covers a period when he was in college, way back in the 1920's before he ever started any professional prac-

(Testimony of Robert F. Herre.)

tice in medicine. I fail utterly to see the materiality of it. I assume that it is offered on the theory that it is prejudicial. I know of no other theory upon which it could be offered.

Mr. Royston: I will assure the Court it isn't offered on that theory. It may seem ridiculous, but the only way I know to conduct this type of case is to go back and cover any period in which the defendant might have had any substantial amount of income. Even though he was in college or internship, other than this there is no way to show he may have had any income, he may have been making any fabulous amount so far as we know.

Mr. Parker: This doesn't show what his income was.

Mr. Royston: It shows he didn't file a tax return.

Mr. Parker: Well, now, we are debating over this exhibit and you are now stating to the jury what you think it shows. I don't recall filing a tax return when I was in [52] college either. I don't know what that has to do——

Mr. Royston: If it please the Court——

Mr. Parker: I doubt if Mr. Royston filed a tax return while he was in college.

Mr. Royston: That is correct.

Mr. Parker: But I don't think I would suggest that is material whether or not he properly filed for 1953.

Mr. Royston: If we are trying to establish my

(Testimony of Robert F. Herre.)

net worth in 1953 it certainly would be material whether I had any income a few years ago or any substantial income. It is offered solely for that basis, to overcome the probability of any substantial income during those years which might account for this great increase in net worth in later years.

Mr. Parker: I submit it doesn't prove anything.

Mr. Royston: It is offered.

Mr. Parker: He may have had a wealthy family and his earnings wouldn't make any difference. I don't think it is of any great significance, your Honor. It seems to me it goes far afield. If the Court feels it has any probative value, the Government is being deprived by not having this in. I am not going to object further to it but I am at a total loss to understand——

The Court: I don't know at this time whether it will be worth anything to the jury. However, I take it there will have to be a great deal more evidence before anybody can [53] determine that. I am going to admit it because I don't think there is any great prejudice. I don't see how there could be. That is 13 in evidence.

(Government's Exhibit 13 marked in evidence.)

Q. (By Mr. Royston): Mr. Herre, in connection with your investigation what was the next thing you did?

A. I contacted the St. Louis University Medical

(Testimony of Robert F. Herre.)

School and searched their records for anything that would be of significance in this case.

Q. For what particular years was that to cover?

A. That was to cover the years October, 1928, to June, 1932.

Q. Did you find any evidence of employment during the school years? A. No.

Q. What was the next thing you did in this investigation?

A. I determined the place of abode of Mr. Lutfy at the time he was attending St. Louis University. During part of that time he was staying at 3515 Park Avenue, which was a rooming house.

Q. All right, sir, and what else?

Mr. Parker: I take it, if your Honor please, this must all be hearsay. I don't see how it could be otherwise.

The Court: Are you objecting to it?

Mr. Parker: I do.

The Court: The objection will be sustained. [54]

Q. (By Mr. Royston): What was the next thing you did in your investigation, Mr. Herre?

A. All of the banks in St. Louis and all of the banks in St. Louis County surrounding the city of St. Louis were contacted to determine whether or not they had any business transactions of any kind whatsoever with Lutfy.

Q. What period of years was that to cover?

A. That covered the period 1928 to 1933.

Q. Were you able to discover any records in the banks in that area?

(Testimony of Robert F. Herre.)

A. There were no records.

Mr. Parker: Just a moment. The further objection on the ground it is hearsay.

The Court: The objection will be sustained. That's not proper, Mr. Royston, to have a witness come here and testify as to the existence or non-existence of records when he has just gone in there and inquired. The jury will disregard the last answer of the witness.

Mr. Royston: If it please the Court, it is my understanding that the only way the Internal Revenue could obtain any of those records was inquire for the specific records and if the banks report they don't have those records the only thing we can do is produce the agent to testify to that fact.

The Court: No, you can produce the people at the banks. They are the ones that have the knowledge. What they [55] tell this witness is strictly hearsay. How would counsel cross-examine a witness who appears as this one does. All he says is, "They told me they didn't have them."

Mr. Royston: Yes, sir.

The Court: Assuming counsel should have reason to believe there were some records, how in the world could he cross-examine this witness. If you had somebody from the bank there is a very effective way of cross-examining them.

Mr. Royston: There was about fifty banks in the area and I didn't think it would be incumbent for us to bring a representative from each bank to state there were no records.

(Testimony of Robert F. Herre.)

The Court: The fact it may be burdensome, Mr. Royston, it isn't any basis for hearsay evidence.

Mr. Royston: All right, sir, I won't let it go any further.

Q. (By Mr. Royston): Did you do anything further in your investigation, Mr. Herre?

A. The records of the city of St. Louis and St. Louis County pertaining to property transactions, liens, mortgages, chattel mortgages, were searched in an effort to find the name of Lutfy.

Q. Did you search those records yourself?

A. I personally searched the records.

Q. What were the results of your search?

A. They were negative. [56]

Q. You found no record?

A. I found no record of Lutfy.

Mr. Royston: Cross-examine.

Cross-Examination

By Mr. Parker:

Q. I take it you don't know Dr. Lutfy at all?

A. No, sir.

Q. Never saw him until yesterday?

A. That is correct.

Q. Never talked to him in your life?

A. No, sir.

Q. Just a name to you?

A. That is correct.

Mr. Parker: That is all.

Mr. Royston: Come down, Mr. Herre.

(Witness excused.)

CHARLES M. WIGHTMAN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Royston: [57]

* * *

A. This is a deposit slip of Louis P. Lutfy dated 11/24/44.

Q. And does it show what was deposited?

A. It was deposit proceeds of war bonds in the amount of \$14,195.12.

Q. Now, with reference to the remainder of the document what is that there in your left hand?

A. This is the ledger sheet of Louis Lutfy, M.D., includes the month of November, 1944.

Q. Now, can you state from examining that ledger sheet whether it shows this deposit which you state was reflected on the slip?

A. Yes, it does. It shows on November 24, 1944, the deposit for \$14,195.12 was put into the account of Louis P. Lutfy, M.D.

Q. Now, with reference to Government's Exhibit 12, I will ask you to examine those photostatic copies and state whether or not you can tell where those bonds were cashed? A. Yes, sir.

Q. Can you state where they were cashed?

A. Yes, sir.

Q. Where were they cashed?

A. Cashd at the Valley National Bank Head Office.

(Testimony of Charles M. Wightman.)

Q. That is your office there in Phoenix?

A. That is right, sir. [62]

* * *

FRED DONOVAN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston: [65]

* * *

Mr. Parker: If you want that exhibit in it is all right with me.

Mr. Roylston: I don't care. If we can stipulate to it I will be more than glad to.

The Court: I can't read most of the notations. There is one I think would be entirely improper. Perhaps counsel had better see if——

Mr. Parker: I have here a list of these payments and dates which they made and the exact amount is there. And I am perfectly willing to stipulate to them and read them into the record.

Mr. Roylston: That will be fine with me.

Mr. Parker: "Payment made by Louis P. Lutfy to [67] Barrow's Furniture Company, February 6, 1947, \$142.55. February 27, 1947, \$50.95. May 13th, 1947, \$12.69. June 21st, 1947, \$17.75." Is that correct, counsel?

Mr. Roylston: Yes, sir, that is correct.

The Court: It is so stipulated?

(Testimony of Fred Donovan.)

Mr. Parker: Yes, your Honor.

Mr. Royston: Yes, your Honor.

The Court: Members of the jury, ordinarily when counsel makes a statement it is not any evidence it is just counsel's statement. However, when both counsel say that they stipulate upon a certain thing then the facts to which they stipulate must be taken by the jury to be true. In this particular instance they have just agreed on certain dates, the payments that were made by Dr. Lutfy to Barrow's Furniture. They have agreed on that and the jury must take that as true.

Q. (By Mr. Royston): Mr. Donovan, can you examine—without examining that record do you know what these purchases that have been stipulated to, what items these were purchases of?

A. What kind of purchase?

Q. Yes, what type merchandise?

A. I have no idea.

Q. What type merchandise does Barrow's Furniture carry?

A. Anything in the furniture line.

Q. Does it carry both office and home furnishings? [68]

A. Yes, it does.

Mr. Royston: No further questions.

Mr. Parker: No questions. [69]

* * *

MRS. MARGARET LARSON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Miss Reimann:

* * *

A. I am from Santa Barbara, California.

Q. Where are you employed over there?

A. I am employed by Westons Camera Store.

Q. How long have you been employed there?

A. Two and a half years.

Q. What is your position there?

A. Office manager.

Q. And you were subpoenaed to bring some records in regard to this case from the Westons Camera Shop, is that correct? A. Yes.

Q. Are these the records kept in the regular course of your business? A. Yes, they are.

Q. You have access to these records?

A. Yes.

Q. You are in charge of them?

A. Yes. [73]

Q. You didn't bring the complete ledger sheet on Dr. Lutfy's account?

A. We have a mail order business and it is not customary to keep a ledger account for cash mail order sales.

Q. This is the complete record?

A. This is the complete record.

(Government's Exhibit 18 marked for identification.)

(Testimony of Mrs. Margaret Larson.)

Mr. Parker: I might suggest to counsel I have a list of these and am perfectly willing to stipulate if the ledger sheets are offered in any manner.

Miss Reimann: We have no objection.

Mr. Parker: We have offered heretofore to stipulate that if the stipulation offered is not a correct statement the witness is here to correct it, if there is any error.

We offer to stipulate the following purchases by Dr. Lutfy from Westons Camera Supply Center, Santa Barbara, California—and Mrs. Larson, perhaps you can check me on this. “Item 21847, \$360.50.” And that merchandise was returned and a check given by your company back to Dr. Lutfy for the full amount of \$360.50.

The Witness: That is correct.

Mr. Parker: 11/25/47, \$93.90?

The Witness: Correct.

Mr. Parker: And 11/30/48, 165?

The Witness: That is correct. [73-A]

The Court: When you say 165, Mr. Parker——

Mr. Parker: \$165. Those items were correct?

The Witness: That is correct.

Miss Reimann: It is my understanding, Mr. Parker, in the stipulation is included the return of the one camera and check sent to Dr. Lutfy and the amount he paid for it?

Mr. Parker: Yes, ma'am.

Miss Reimann: That is included in the stipulation?

Mr. Parker: Yes, ma'am. That was returned

(Testimony of Mrs. Margaret Larson.)

and the check returned to Dr. Lutfy for that item. Now, I do not have in mind what the other purchases were. If you care to examine the witness while she is here regarding that matter.

Q. (By Miss Reimann): From looking at these slips you have here can you state what the item \$360.50 was for?

A. Yes. That was for a Leica camera.

Mr. Parker: That was the item returned?

The Witness: That is correct.

Q. (By Miss Reimann): And looking at the next amount of \$93.90 can you tell what that was for?

A. Yes. An Iconta thirty-five millimeter camera.

Miss Reimann: I forget the amount of the next stipulation.

Mr. Parker: The next one is November 30, 1948, the item is \$165.

The Witness: Yes. The item of \$165 was [74] also augmented by equipment which was sent to us for credit, a Medalist camera and a great many items were sent against that credit.

Q. (By Miss Reimann): What type items?

A. An Iconta thirty-five millimeter camera, a printer, a tray and print tongs, all photographic equipment.

Q. The whole bill of \$165 was covered by photographic equipment, is that correct?

A. Yes. [75]

* * *

ROBERT M. FOSTER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston: [78]

* * *

Mr. Parker: If it will expedite the matter, Mr. Roylston, we have offered to stipulate to these, the amounts and dates, as quick as I can locate them.

I have the dates and amount. The witness can check me. A purchase on June 11, 1946, \$60.02. On January 21, 1948, \$10.46. February 13, 1948, \$90.78. June 14, 1948, \$201.96. Is that correct?

The Witness: That is right.

Mr. Parker: We stipulate those purchases were made by the doctor on those dates from Dorris Heyman, in those amounts.

Mr. Roylston: Yes, sir. I so stipulate, your Honor.

The Court: Very well.

Q. (By Mr. Roylston): Now, referring to the purchase of \$90.78, can you tell from your records what that article was? A. Yes.

Q. What was it?

A. It was a French provincial extension table with three twelve-inch leaves.

Q. Can you tell from your records where that particular [79] French provincial table was delivered?

A. I had the directions—I don't know whether

(Testimony of Robert M. Foster.)

it was delivered there—it should have been delivered to 1305 East Granada Road. That was the shipping address. The statements were mailed to 301 West MacDowell, Phoenix. [80]

* * *

The Court: Let the record show the jury has withdrawn from the courtroom, the defendant present with his counsel and the United States Attorney is present.

This exhibit that was Government's 9 for identification which I took under consideration yesterday, the exhibit as now composed consists of a personnel card, apparently, that I can't see has any conceivable bearing on the case, a little [85] card with some notations in pen on it and a typewritten summary prepared by the witness who presented the exhibit, Mr. Beale. As far as to the objection as to relevancy is concerned, and I am addressing myself to the little card and the summary, that objection will be overruled. However, counsel has also objected on the ground of lack of authenticity, and with regard to the little card I don't think it has been sufficiently authenticated. The witness testified that it was in the handwriting of some people in the payroll office, that they had a practice of sometimes putting people on a payroll and not putting them on, he himself was on it sometimes and sometimes he wasn't. I take it the purpose of it is to show the compensation paid to Dr. Lutfy. I don't think there has been a sufficient authentication for

that purpose. With regard to the summary, a summary is proper wherever the records themselves are produced and the witness testifies that he has made the summary and the records from which he made it are available. In this particular situation, as I understand it, the witness has produced some of the records from which he made the summary, but it is my understanding all of the records from which he made the summary are not admissible. In the case of a public record we have a statute that permits the custodian of the record to certify that he has examined the records and they don't contain this or that. I know of no statute or rule that will permit a witness himself to make the summary, other than a [86] public officer, then producing part of the records from which he made it, have it offered. So for those reasons the objection on the ground of lack of authentication is sustained at this time. [87]

* * *

CLARENCE J. BEALE

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. Royston:

Q. Mr. Beale, you testified yesterday afternoon?

A. Yes, sir.

Q. With respect to these two rolls of records would you state again just what period of time those records cover, those payroll records?

(Testimony of Clarence J. Beale.)

A. I don't know that I can call it by month but they [88] cover the entire period of time during which Dr. Lutfy was employed by the United Verde Extension Mine and for several months after he left. They cover entirely those months during which deductions were made from employees at the mine and the smelter, they are separate, during those months in which deductions were made in Dr. Lutfy's favor. I looked through for several months after the last month appearing there and I might say they represent, say, fifteen months. Now, if you multiply that by twenty-five years you would have some idea what I would have to pack down here if you are going to talk about a complete record running during the entire life of the United Verde Extension Mine. I couldn't see any point to it so I didn't do it.

Q. Are these the complete payroll record?

A. Absolutely. No sheet has been removed—I think there were one or two months during the beginning and end when there were no deductions but nevertheless they are in there. I took them out of this five or six hundred pounds of payrolls lying there in the corner of the vault and I with the help of another man, we simply opened them and we took out all the months, I would say maybe fifteen months or sixteen maybe, I don't know. It is on the recapitulation I made. There couldn't be a more complete payroll than that. They are all there.

Q. For the entire period involved?

(Testimony of Clarence J. Beale.)

A. For the entire period involved, yes. I looked through [89] there for several months after the doctor left. I kept looking through there until there were no more deductions so naturally I didn't bring them.

Q. With respect to Government's Exhibit 9 for identification, with respect to this card that is clipped to the typewritten papers, will you state again just where in the mining company's records that card was obtained?

A. It was enclosed with a bunch of property that thick, the same kind of cards, containing all the names of any salaried man that had been employed during those twenty-five years. They just kept it there for ready reference, I presume. That record, after I found that along with the other cards which I brought, they were handed back to me; I recognized them. The man that made that record, he is dead now, he was cashier and chief clerk at the main office where the checks were made up. I recognized it immediately because he and I contacted each other daily so I know his handwriting as well as I know my own. But to confirm that I took it to another man who had been a bookkeeper——

Mr. Parker: Just a moment.

Q. (By Mr. Royston): Let me ask this next question. A. Go ahead.

Q. Did you of your own knowledge know where the file was in which the cards showing salaries of salaried employees were kept? [90]

A. You mean these cards?

(Testimony of Clarence J. Beale.)

Q. Didn't you state that the card was kept on each of the salaried employees?

A. That is right.

Q. They were kept in a particular file?

A. They were right there in my vault.

Q. You removed this card from that file?

A. I did, but I also have all the other cards, but they were handed back to me, they were up in a suitcase.

Q. This came from that file?

A. This came out of that bunch of cards.

Q. You state the person who made out that card is now dead?

A. That is right, a man named Smith, Stanley Smith.

Q. The cards kept in this file, was that the complete record to show the list of salaried employees and what they received?

A. Yes. As far as I know they were all there, my own and all the rest of the salaried men.

Mr. Royston: With the Court's permission I will remove this one card that was not connected with the other Exhibits. And I will reoffer Government's Exhibit 9 for identification into evidence.

Mr. Parker: Mr. Beale, I don't want to belabor this point too much, for the simple reason I don't think it matters [91] one way or the other.

The Court: I don't hear you, Mr. Parker.

Mr. Parker: I say I don't want to belabor this point too much because I don't think it is that important, but I would like to ask you this: I may

(Testimony of Clarence J. Beale.)

have misunderstood you, but I thought you said yesterday that these deductions represented only part of the payroll. I did not understand this was a complete——

A. If I may explain, that recapitulation there, if anyone checks it with those two payrolls will find that that is just taken off, right off those two payrolls right there and those are complete. There is nothing been removed. It is about sixteen full months.

Q. (By Mr. Parker): These two payrolls you refer to are the two rolls that are lying on the table here that have not been marked for identification, I believe. What two payrolls are those?

A. One is the mine and the other the smelter, kept in two different offices.

Q. Did that cover the entire payrolls of the United Verde Extension Mining Company?

A. Absolutely, the whole works, except this little handful of salaried men, probably six or seven that sometimes were kept separately and very often thrown on the main payroll. In the case of Dr. Lutfy, his name doesn't appear on those [92] payrolls. He and the other doctors and several others were kept privately. I don't know what became of that.

Q. You mean there was some other payroll that Dr. Lutfy and the other doctors probably appeared on?

A. That is right. They were given what was called a clean check, there were no deductions, prob-

(Testimony of Clarence J. Beale.)

ably just a short piece of paper marked the number of the check by which they were paid. The management didn't care to have their names on these big public payrolls, so to speak, lying open and everybody gaping at them, that is all.

Q. Do you know where this payroll on which the doctor's—do you know where that is?

A. I searched high and low. It has been mislaid, destroyed or something. I went to the former bookkeeper and he says, "I don't remember just what form," he says, "We kept a little sheet there to record the payment, the number of the check." It ought to be there—well, it isn't there, it is gone. But that other, that memorandum card—

Q. This card you have attached here in the handwriting of the gentleman whom you say is dead—

A. That is right.

Q. —it would appear to indicate a monthly, I suppose, basic salary? A. That is right.

Q. I am presuming? [93]

A. That is right.

Q. I assume these other amounts you found to be deducted from these payrolls was from each worker or some workers? A. That is right.

Q. Those amounts were paid to the doctors in addition to their basic monthly salary?

A. Certainly. It had nothing to do with the doctor's salary. He was given his check at the first of the month, of the preceding month. These are simply, some time along after the first when the payroll was closed the doctor was handed the check

(Testimony of Clarence J. Beale.)

for these various deductions and that is the record of it there.

Q. This card, of course, would not show, only apparently shows the salary that was fixed but it does not actually show anything about whether or not he got a full month's salary——

A. He certainly did.

Q. ——for a particular month. I mean if he was off it wouldn't show that?

A. I don't know if he was off, but in any event that was what he was paid month after month until his employment terminated.

Q. But isn't it true, Mr. Beale, you would have to have the payroll on which he appeared to ascertain that fact with certainty?

A. Probably technically so, but it is gone. I [94] can't produce it, that is all. There is just that memorandum is all I have.

Mr. Parker: If your Honor please, I am going to renew the objection previously made. I don't think the situation is essentially much better than it was before.

Mr. Royston: If it is on the basis of the fact this is only the stated monthly salary he received and that if he was absent he might not have gotten that much, any of that would be a matter for defense.

The Court: Let me understand something. Does that little card purport to show all of the monthly salary that was paid to Dr. Lutfy during the entire time he was there? I am talking of the salary.

(Testimony of Clarence J. Beale.)

The Witness: Absolutely. I can't imagine any deductions being made from the doctor's salary. He got a clean check.

The Court: May I see it, please? Was he paid a monthly salary?

The Witness: Yes, sir; he was paid a monthly salary.

The Court: What I can't understand is this has gaps of much as eight months in the dates.

A. I can explain that. For instance, he entered the employ of the United Verde Extension Mining Company on the 24th of September, 1934. For that month he was paid \$219 and he was paid at—well, that would be—however, whatever that [95] monthly rate was that was the proportion he was paid. Then on the first of February he was paid \$300 and that continued for February and March. On the first of April, 1935, he was raised to 350; that continued until he was off and the hospital was closed on the first of December, 1935, he was paid \$350. In other words, they didn't enumerate each month there. It just goes on, shows where his salary was paid. There are no gaps there at all. It shows where the only notation that would be made was when he was given a raise and the other, it continued on and on.

Q. Mr. Beale, there may not be any gaps, but until you explained it to me just now I wouldn't have——

A. I hadn't thought of that, your Honor, but I can say of my own knowledge I had almost daily

(Testimony of Clarence J. Beale.)

contact with the doctor and I don't recollect he was ever off and to me that is very plain. He started on a certain rate and within a month or two he was raised, then it continued for two months then it was raised to \$350 and continued until his employment was terminated.

Q. Going back to the rolls on the table there, I understand you now to say you have in those rolls the complete payroll of all the employees of United Verde? A. Absolutely.

Q. That is true regardless of whether or not a particular man had a deduction for Dr. Lutfy or not?

A. That is right. They are complete. I didn't take a [96] sheet or month out. They cover the entire period, whatever that little recapitulation shows, from the start to finish. Then several months later I went through the payroll—you see, there were deductions after the doctor left the employ. For instance, an employee signed up two months before the doctor left for \$50, well, they took \$5 every two weeks and after the doctor had terminated his employment and gone we kept taking that \$5 until a \$50 had been taken from that man's pay and paid to the doctor.

The Court: Do you have anything else?

Mr. Parker: Yes, I do.

Q. (By Mr. Parker): Is this all the money he drew from the company which you have already described?

(Testimony of Clarence J. Beale.)

A. That is all the money he ever drew. That is his salary and the deductions.

Q. You are quite positive about that?

A. Absolutely.

Q. Are you aware he received a \$25 a month allowance for his automobile, regardless of the use of it?

A. It could be. I am speaking about the money paid to him. Whatever he got under the table or around the side——

Q. This wasn't under the table, sir, it was on the table. A. Possibly so.

Q. Are you aware he was furnished a house to live in by the company and that was a part of his compensation? [97] A. It could be.

Q. It could be? A. That is right.

Q. I believe you answered the other day you were not aware of certain other compensation or salary he drew from other sources during that same time?

A. Yes. The other company, for instance, if the doctor had contracted with an employee of the United Verde Copper Company they would have extended the same courtesy to Dr. Lutfy as we did to their doctors, they would deduct it. He could have been getting a check from employees of the other company, that I don't know. I presume they have the records.

Q. But this record you have does not necessarily show fully or completely his earnings?

A. Absolutely not. I have no idea what the

(Testimony of Clarence J. Beale.)

doctor collected in cash and put in his pocket. I don't know anything about that, couldn't possibly know. It was none of my concern. I am just saying what he got in deductions and got in salary I know. What he got in the way of other favors, that I don't know. Possibly the doctor lived in the hospital. As a matter of fact, I think, so he would be subject to call; they naturally didn't charge him any rent, I guess.

Mr. Parker: If your Honor please, it still appears this doesn't shed much light because it isn't a complete record of his earnings for that [98] period.

The Court: It will be admitted for what it may be worth so far as it goes.

(Government's Exhibit 9 marked in evidence.)

Mr. Royston: No further questions.

Mr. Parker: No further questions. [99]

* * *

RAYE WAY

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Miss Reimann:

Q. State your name, please.

A. Raye Way.

Q. Where do you live, Mrs. Way?

A. Williams, Arizona.

Q. How long have you lived there?

(Testimony of Raye Way.)

A. Five years.

Q. What years, if any, did you live in Phoenix, Arizona? A. '45 to '49.

Q. During any of that time were you employed by Dr. Lutfy? [118] A. I was.

Q. When were you employed by him, if you recall? A. From 1947 to 1949.

Q. Do you remember any months on there?

A. I think it was, when I was employed it was after Labor Day, which was September. And I left in May, the end of May.

Q. That would be from approximately of September of '47 to May of '49, is that correct, approximately? A. Approximately.

Q. In what type of employment did you work for him, what did you do?

A. I was employed as a medical stenographer, receptionist and bookkeeper.

Q. Can you elaborate on that just a little, what your duties completely consisted of?

A. Taking all dictation, medical dictation and any other dictation that the doctor had to give me; keeping the bookkeeping, doing the bookkeeping, which was a daily log book, and acting as receptionist. When the patients came to the office they came to me first.

Q. You referred to this daily log book. Will you explain what type book it was and what you kept in that book, what you did yourself?

A. It was a doctor's daily log book. It was a yearly book. Each day was listed in the book, the

(Testimony of Raye Way.)

day and the month [119] throughout the entire year. When a patient came into the office they would come to me first as receptionist. I would enter their name on the log book on the day they came in and their medical record or chart would be pulled from the file and I would leave it on my desk until the doctor was ready to see that patient. The doctor took that patient and the patient's file into the office; when he was through with his services the chart was handed to me with the date the patient was in, the treatment rendered and the charge.

Q. Would the charges be in cash or sometimes were they billed?

A. They would be in cash; they would be charged; they would be checks.

Q. Did you enter every item of that in the daily log book?

A. Every item was entered in the log book.

Q. If it was charged, was it entered in the log book, too?

A. It was entered under "charge."

Q. If you got the cash would you enter that?

A. Under a cash call.

Q. How would you know it was a cash call or charge call?

A. If I saw the charge on the patient's chart that would be three or five dollars; they would stop at my desk and I would ask him if they were going to pay it or charge it. If they paid I made out a receipt and we had the receipts in duplicate. The

(Testimony of Raye Way.)

patient received the receipt and I had the [120] duplicate in the receipt book.

Q. You would say you kept a pretty complete record in that log book? A. Yes.

Q. How often would you check this log book?

A. It would be checked daily after the day's work.

Q. How was it checked?

A. I always had \$10 in my cash box to start the day for change. All the money was given to me and put in this cash box.

Q. When you say it was given to you, who gave it to you?

A. Patients; patients only. Or unless a check had to be cashed a patient would come into the office and wouldn't want to see the doctor but would want to pay their bill. Maybe a payroll check and I couldn't cash their check, I would go into the doctor's office and I would ask him if he could cash the check; he would cash the check and I would give the patient their change and they would pay their bill in full, then that check would go into the cash box.

Q. How was this checked by Dr. Lutfy? I believe you said he checked it at the end of each day?

A. At the end of each day Dr. Lutfy checked the daily log book, the cash, the charge and it was compared with the cash I had in my cash book.

Q. What would happen if you were off a [121] bit?

A. It was either the addition or sometimes I

(Testimony of Raye Way.)

may have put, when it was cash, I would put it in a charge or if I had been out to lunch and a receipt was made I didn't look at the receipt book and just wouldn't enter that name on the daily log.

Q. Would you fix this or get your books to balance every day before you went home?

A. Every day before we went home.

Q. You and Dr. Lutfy worked on that together at the end of each day? A. Yes.

Q. So that your records balanced as far as the cash you had in with what you had taken in?

A. Yes.

Q. Was Dr. Lutfy particular with you about this type of work?

A. Yes; he stressed accuracy all the time.

Q. The other work you did, say your typing, your dictating that you took from him, was he a particular man about that? A. Very.

Q. Would you explain that a little?

A. My letters had to be perfect. He hired me as a medical secretary and when he gave me medical dictation I had to be able to transcribe it properly. He did not like any erasures on his letters. They just had to be perfect. [122]

Q. Were you ever in Dr. Lutfy's home?

A. On several occasions.

Q. There for dinner?

A. Invited by his wife for dinner.

Q. Do you recall where he lived at the time you worked for him?

(Testimony of Raye Way.)

A. When I first worked for him I think it was Granada.

Q. Would you describe the appearance of the house, whether it was one house, whether several units put together?

A. You mean on Granada?

Q. Did Dr. Lutfy ever live any place else where you visited him? A. Yes; it was a triplex.

Q. Where was that, if you recall?

A. I think on Maryland.

Q. When you say a triplex, what do you mean by that?

A. Well, looked like a court, three.

Q. Did Dr. Lutfy, when you visited him, live in all of it, was it made together into one house, so to speak, for Dr. Lutfy and his family?

A. As far as I know. I was only in the dining room and living room.

Q. Did you ever see any other of the family there? A. No.

Q. Were the buildings connected, if you [123] know?

A. I can remember an archway into another room which may have been a second triplex, the second apartment.

Q. At any time, Mrs. Way, did you help Dr. Lutfy in compiling any figures for his income tax reports? A. Yes, I did.

Q. I want to show you this portion that I have taken out of Government's 8 in evidence and ask

(Testimony of Raye Way.)

you to look at this and see if you recognize any part of it?

A. I know that is the typewriter because there was an unusual print. And these are my figures on this page; these are my figures. These are my figures, this is not. This is not, this is not and this is not my writing. This is not my writing (indicating).

Q. But part of these figures on this particular group through here? A. Yes.

Q. You have put down there and you have set up these typewritten——

A. Yes. They were headings we made and these headings on these sheets were put on my X-ray table because it was the most convenient place.

Q. All right. If I may I would like to show the Jury the way this is put on.

Will you explain to the Court and Jury just what method you used in compiling these figures on here, where you did it, [124] what you did? I want you to remember it to the best of your ability, the way you did it and what the doctor did?

A. Before income tax the doctor instructed me to make out headings on different sheets of paper.

Q. Can you recall the different headings?

A. Some I can recall because I used some of these headings in this daily log. There is a sheet at the end of each month that has expenditures listed and there are titles. I can remember stationery, surgical supplies, lights, telephone.

Q. Automobile? A. Automobile.

(Testimony of Raye Way.)

Q. If these are yours maybe you can refresh your memory and read them off?

A. Office headings the doctor would give me, automobile upkeep, I could get that from the back of the book——

Q. Just a minute. When you say “from the back of the book”——

A. I don't mean from the back of the book. I mean every month there was a sheet in that daily log book that had all the expenses that were in headings that were made throughout the month.

Q. Was automobile expenses one of them?

A. I am not sure of that.

Q. All right. A. Office. [125]

Q. Go on.

A. Electricity, gas, water, entertainment, business taxes, X-ray supplies, stationery, and so forth. Laundry service, telephone and doctors' directory. Insurance, no. Collection fees, yes. Salaries and labor, yes. Drugs and supplies, yes.

Q. Now, this piece of paper would be blank and you would type all these headings at the top?

A. Yes.

Q. The ones Dr. Lutfy told you to type in?

A. Yes.

Q. Then what would you do with those?

A. I had all these papers on the X-ray table.

Q. These papers——

A. Those papers. Dr. Lutfy would sit at a table with a check book and daily log for that year. He would read the name and the amount and if I knew

(Testimony of Raye Way.)

the heading, like if it was for stamps or stationery, I knew which heading to put it under; if I didn't know it I would ask him which heading to put that particular amount under.

Q. When you say he would read the name, do you mean he would read the name the check was made out to?

A. The name the check was made out to and the amount.

Q. Say it happened to be a company you didn't know you would say, "Where do I put this," and he would tell you?

A. That is right. [126]

Q. There were quite a few of them you didn't know where they went, is that correct, that you would ask him about?

A. I would ask him about.

Q. Did you put any on here, in your recollection, that you weren't sure of, just a haphazard guess, you would put it on there without asking the doctor?

A. No.

Q. Did you total these up?

A. When we were all completed I take those to my office and add them on the adding machine, then for each sheet I clip on that adding machine tape for the total amount, then take them into the doctor and he would give it to his auditor with the log book.

Q. Did you have any more to do with the compiling of the records for his income tax returns?

A. That is all. The only other thing I did was for his social security and withholding for myself

(Testimony of Raye Way.)

and another employee and sending in the quarterly reports.

Q. But as far as the doctor's reports were concerned, the only thing you had to do with them was getting together and your putting the headings and figures down where he told you to put them, is that correct? A. Correct.

Q. Did you do any correspondence for the doctor in regards to guns or cameras? [127]

A. I took dictation on that.

Q. What type of stationery did you use, if you recall?

A. It was different than the regular stationery. I don't recall the exact name. It was Phoenix Photo.

Q. Did it have a letterhead on it?

A. A letterhead.

Q. Do you recall what the letterhead was?

A. I say I don't recall if it was "Phoenix Photo," I don't recall, but it was a letterhead.

Q. It wasn't the doctor's normal letterhead?

A. No. We had a box of stationery in the diathermy room and I only used it for that particular correspondence.

The Court: At this time we will take the regular afternoon recess for about ten minutes.

(Recess.)

Q. (By Miss Reimann): Your name is Raye Way, you were testifying before we took the recess? A. Yes, I was.

(Testimony of Raye Way.)

Q. I would like to show you Government's Exhibit 26 for identification and ask you if you have ever seen any stationery of that kind before?

A. I have not.

Q. You have never seen any like that?

A. No.

Q. Can you describe a little more fully the [128] type stationery you used when you wrote these letters you testified to in regard to the guns?

A. May I pick this up? I think it was in blue letters. I don't know if the name is correct or not; I think it had the Phoenix Photo Supply in blue letters and there wasn't, I don't think there was an office address, Phoenix, Arizona, but this wasn't on there and I don't know about this (indicating).

Q. Was Dr. Lutfy's name on it any place you can recall?

A. I can recall only when it was signed.

Q. I believe you stated it was a special piece of paper you used when you wrote letters in regard to what?

A. To guns and cameras. It was a letterhead.

Q. And did you write quite a few letters in regard to guns and cameras for the doctor?

A. Well, not too many.

Q. Do you know what type guns they were that were referred to in the letters? Do you know anything about guns?

A. Well, when I took the dictation I didn't know anything about guns or cameras so I had to ask how some of the words were spelled.

(Testimony of Raye Way.)

Q. These letters you wrote in regard to, say, the guns, do you recall any specific place you wrote these letters?

A. No, I don't, only we had the Rifleman Magazine in our reception room; there were ads there for guns for sale, and, you know, "I have this, what do you have," and the doctor would [129] answer an ad like that. He would make the ad up in long-hand.

Q. At any time did you write to the Rifleman Magazine and put in an ad for the doctor?

A. An ad was put in and the doctor would write it and I would type it and enclose it in an envelope and mail it.

Q. Would you describe the best you can remember the content of the ad the doctor would send to the Rifleman Magazine, was it for swapping or sale of the rifles, do you recall?

A. I don't recall.

Q. Do you recall whether there were any sales of cameras or not?

A. You mean in this Rifleman Magazine?

Q. Yes; any ads for the sale?

A. I don't remember any. I just remember the guns, gun or guns.

Q. You state you don't recall whether the doctor ever tried himself to sell one of his guns, you don't recall?

A. No.

Q. But you know you wrote up certain ads?

A. This one ad in particular. It was just this ad, and I don't remember of any other ad.

Q. What do you remember about that ad?

(Testimony of Raye Way.)

A. I don't know. I wasn't interested in that type work, I was just interested in getting the dictation and I did nothing else. [130]

Q. Did any checks ever come into you at the office for the payment of a gun?

A. I opened all the mail and if there was a check or any correspondence pertaining to a gun or a camera it was put on the doctor's desk. If there was a check it was put on his desk. That is all I had to do with it.

Q. There were some checks then that came in?

A. I don't remember; if there were, I just put them on his desk.

Q. At any time when you were in the office and while you were working there, did you see any of the doctor's patients pick up a gun there or did any of them pay you for a gun? A. Never.

Q. Did you ever see any guns in the office?

A. Never.

Miss Reimann: Your witness.

Cross-Examination

By Mr. Parker:

Q. Mrs. Way, I believe you stated you reside in Williams, Arizona? A. Yes, sir.

Q. And that you worked for Dr. Lutfy from 1947, some time in 1947 until April or May of 1949?

A. Yes, sir.

Q. And you are married, are you?

A. I am. [131]

(Testimony of Raye Way.)

Q. When were you married with reference to when you left Dr. Lutfy? A. July 3rd, 1949.

Q. Is it a fact that you left Dr. Lutfy's employ for the purpose of getting married?

A. Yes, sir.

Q. And moving to Williams? A. Yes, sir.

Q. Your husband's name is what?

A. Mr. Thomas E. Way.

Q. What is his occupation?

A. Justice of the Peace, Magistrate and ex officio Coroner.

Q. At Williams, Arizona?

A. At Williams, Arizona.

Q. How long has he been Justice of the Peace and Magistrate?

A. Thirteen years. And re-elected, I heard that today, five to one.

Q. Mrs. Way, at the time or the occasions when you visited in Dr. Lutfy's home at the invitation of Mrs. Lutfy, isn't it a fact his home was very plain and not at all luxurious or elaborate?

A. It wasn't pretentious. I was surprised.

Q. You were surprised? [132] A. Yes, sir.

Q. You were surprised to find he was living in very plain, very modest surroundings?

A. Yes, sir.

Q. That was true on both Granada and Maryland when he resided in the apartment there?

A. With that triplex there may have been room, but I was in a dining room and a living room; in my estimation, it wasn't elaborate, it was plain.

(Testimony of Raye Way.)

Q. Of course I believe I understood you to say that you did not know how much of this triplex was occupied by Dr. and Mrs. Lutfy because you were only in two rooms? A. I was only a guest.

Q. You made no investigation to see how much of the building they occupied? A. No, sir.

Q. You had no means of knowing whether the other two apartments were rented to tenants or not, there was just the children and Dr. and Mrs. Lutfy, that is all the persons you saw? A. Yes, sir.

Q. How many children did Dr. Lutfy have?

A. Three.

Q. Now, I believe you stated that there was one other employee there at the time you were working for Dr. Lutfy or [133] part of that time?

A. You mean in the office?

Q. Yes, ma'am. A. Yes; a technician.

Q. Is that what you would call a lab——

A. An X-ray and lab technician.

Q. Do you remember the name of that employee? A. Yes, I do.

Q. What was her name?

A. Harriett LeBeau.

Q. Was she there all the time you were there?

A. No. I had been there for a while before she was employed.

Q. You were there yourself about two and a half years, were you, or two years?

A. Not by myself.

Q. I don't mean by yourself, you were employed by Dr. Lutfy what, about two years, was it?

(Testimony of Raye Way.)

A. Yes.

Q. Did Harriett LeBeau have anything to do with the records or entries in the log book and so forth that you have described?

A. When I was out to lunch she stayed in the office and if any patient came in with money to pay on their bill she issued a receipt. When I went on my vacation she handled the [134] books, the log book and the cash when I was on my vacation.

Q. Now, Mrs. Way, in order that the Jury may have a somewhat more complete picture of this log book, did not each sheet have a number of columns, say, possibly three columns down the full length of the book in which to enter charges or money paid or that sort of thing?

A. That is right.

Q. Do you remember how those three columns were headed, what they were, how they were headed at the top of the sheet?

A. If I got a glance at it I could remember.

Q. We have them but we don't happen to have them here at this moment. I understood you to say that Dr. Lutfy was quite meticulous in the work that was done in the office?

A. Yes, sir.

Q. Meticulous in both keeping of his financial records and writing of letters and so forth?

A. Yes, sir.

Q. I will ask you if those three columns in that log book weren't entitled, one of them, "charge," the other, "cash," and the other, "received on account"?

A. Yes.

Q. Does that sound about right?

(Testimony of Raye Way.)

A. That is right.

Q. Had you had any particular experience in bookkeeping or the keeping of accounts? [135]

A. No, sir.

Q. You were, I believe you stated, a medical secretary? A. Yes, sir.

Q. Had you worked for any other doctor or doctors prior to the time you worked for Dr. Lutfy?

A. Yes, sir.

Q. What doctors had you worked for?

A. I worked for the Good Samaritan Hospital.

Q. How long did you work for the hospital?

A. Oh, about four or five months and they wanted me to take charge of dictation in surgery and I knew I wasn't that capable and there was a doctor in Phoenix needed a medical secretary so they sent me to this doctor to work for him, the Good Samaritan Hospital.

Q. What doctor was it?

A. Dr. Frank W. Edel.

Q. How long did you work for him?

A. One year.

Q. Did you do any bookkeeping?

A. He had his own receptionist, his own bookkeeper, his own nurses. I took nothing but medical dictation, went with him to the hospital to take all dictation on his patients and in the record room.

Q. Did you work for any other doctor prior to working for Dr. Lutfy? [136]

A. Yes; I worked at Grunow Clinic for Dr.

(Testimony of Raye Way.)

Hartgraves, who is in charge of X-ray and lab; did only X-ray dictation.

Q. How long did you work there?

A. A year.

Q. This was prior to working for Dr. Lutfy?

A. Yes, sir.

Q. Did you have to do any bookkeeping there?

A. No; it was just medical secretary. We had the two secretaries in Dr. Hartgraves' office that took nothing but X-ray and lab dictation.

Q. Was the work with Dr. Lutfy your first experience with bookkeeping? A. Yes, sir.

Q. During your period of employment?

A. Yes, sir.

Q. And had you ever had any training in accounting or bookkeeping? A. No, sir.

Q. And so you were green at it then when you went to work for Dr. Lutfy?

A. When I started to work for Dr. Lutfy he told me about keeping the books and asked me if I had kept books at any of the other doctors' offices; I said I had not. He said it was a simple form of bookkeeping, it would be easy to do. And he stressed accuracy because it is the same entries all the [137] time. You have to be accurate, otherwise you get careless making the entries.

Q. You say he did admonish you or caution you to be sure you kept an accurate set of entries on everything that went through the office?

A. Yes, sir; because it was simple but accuracy was important.

(Testimony of Raye Way.)

Q. That log book we have referred to, that was a doctor's log book, was it not? A. Yes, sir.

Q. Printed and set up especially for the use of doctors?

A. Yes, sir. I had seen that same book in other doctors' offices. I was familiar with the type book it was.

Q. It wasn't any double entry type bookkeeping, was it? A. No.

Q. There was nothing about it, I mean, any system of debits and credits you could balance at the end of the day or end of any particular period of time?

A. No. I just had this index filing system. I used to post things on that were charged or received on account and I used those index cards to make my monthly statements out and they were posted every day.

Q. Tell us about that. I don't believe you have described those before. In other words, the items that went on this daily log book were also entered on the—you had a card, did [138] you?

A. A card index.

Q. For each patient? A. Yes.

Q. And had the patient's name on this card, and did you make entries of the charges and of the payments and so forth on the patient's card as well as on the log book?

A. Correct. If it was a cash there was no necessity in doing that, but if it was charge or received

(Testimony of Raye Way.)

on account then it was posted on the day the charge was made, right onto this card, this index card.

Q. Did you do that, too, as time permitted during the course of the day, did you make the entries on the patient's index card also? A. Yes.

Q. To the best of your ability did you attempt to keep that patient index card as completely and accurately as you could?

A. I had to and if I didn't I got complaints when the bills were sent out.

Q. In other words, you sent the bills out from the patient's index card and if it wasn't accurate I imagine you heard from the patient promptly?

A. Yes, sir. Also on these cards I would put the treatment and the charge in case the patient did call up and wanted [139] to know why they were charged for certain things, why they were charged that much, I would be able to pull this card and be able to tell them the day they came in, the treatment rendered and amount charged.

Q. Were there ever any occasions where you inadvertently or in the hurry or press of work you ever slipped up and didn't get the entry in both places?

A. That was why I was pleased—I don't know that that is the word—but the books, that Dr. Lutfy checked the books daily, because there have been times when I have put a cash when it was cash under a charge or charge under a cash, see then the cash wouldn't balance so we would have to check the books again.

(Testimony of Raye Way.)

Q. I take it from your answer there were sometimes inadvertencies that were for the most part corrected?

A. Yes. When I got busy, get called in or a patient be waiting for a letter or the telephone be ringing, I would think I was entering it under the right column, but at the end of the day if it was a mistake it was noticed.

Q. Do you know who kept those records before you went to work for him, that is, in 1946 and that part of 1947 before you came to work for him?

A. There was this girl that was there before me and I think she was there maybe for a month and she was a technician at a lab downtown. I don't remember the lab's name, but she [140] was a technician. She was not a medical stenographer; and she would also show me how to make entries, you know, in the book and introduced me to the patients that came in.

Q. Do you remember her name?

A. Yes, sir.

Q. What was it? A. Esther.

Q. Do you know how to spell the last name?

A. Mesterick.

Q. Do you know whether or not she left Phoenix after you left there?

A. The last time I talked to her I understood she was going to school. I don't know where, to study to be a vet.

Q. You spoke of the fact your patients occasionally would come in to cash a check of one sort

(Testimony of Raye Way.)

and another; you mentioned payroll checks. Did you or did the doctor extend that accommodation to his patients of cashing checks for them?

A. If a patient came in with a pay check and didn't want to see the doctor, just wanted to pay his bill, I wouldn't have that kind of cash in my box and go into the doctor's office, show him the check and ask him if he could cash it and most of the time he would cash the check for me, give me the money and I would go out and whatever the bill was, the patient would pay his bill and I would give the patient his change and the check would go in my cash box. [141]

Q. Then how would that check—assume a hypothetical case, suppose the check was \$40 and the bill was \$10, how would that check be entered on the deposits slips when it went to the bank? Would it be entered in the name of the patient or the name of his employee who had given him the check?

A. It would be paid to the order of who the check was made out and that would be put on the deposit slip and the amount of the check.

Q. The full amount of the check?

A. The full amount of the check and what the patient paid would be put on the daily log book.

Q. Then, do I understand correctly—maybe I don't—I was under the impression that the check would be, such a check would be entered on the deposit slip opposite the name of the maker of the check. In other words, if the check was given by

(Testimony of Raye Way.)

Reynolds Metals Company it would say, "Reynolds Metals, \$40."

A. Yes. Then if I happened to make that out, like it would be Reynolds Metal right underneath in parentheses, maybe I would put the patient's name.

Q. Did you make a practice of making out deposit slips to go to the bank, or to what extent did you do that or who did make out the deposit slips most of the time?

A. I would sometimes, but Dr. Lutfy made out the deposit slips. I am sure of this, I would count that money and the [142] checks he would give to me I would total it on my adding machine and put the amount or money with the adding machine tape with the amount on it.

Q. Mrs. Way, is it not true it was a practice of Dr. Lutfy's and one which you also followed, of making out rather detailed deposit slips with the name of the maker of the check opposite each check, not merely the bank number, the name?

A. Right underneath it in small writing in parentheses the patient's name.

Q. And was it your practice to send deposits in each day or once a week, or how did you do that?

A. Well, the bank was down in town; Dr. Lutfy would take and whenever there was a sufficient amount to make a trip to town—I don't remember if it is once a week.

Q. Can you testify that the money which was

(Testimony of Raye Way.)

taken in there was regularly and systematically banked, the checks that came in?

A. The checks that came in, you mean?

Q. Yes. A. To me?

Q. To the best of your knowledge.

A. To the best of my knowledge they were, as well as the cash.

Q. Yes. I believe you also testified when people paid cash they received a receipt of which a duplicate was kept? [143]

A. Yes; we had the duplicate receipt book.

Q. Now, Mrs. Way, you were describing awhile ago the method by which you and Dr. Lutfy prepared the data to be sent to the Business Service Bureau—I think you just referred to the accountants—for the preparation of income tax returns. You stated it was done in the X-ray room, as I recall it? A. Yes.

Q. Was there any particular purpose in doing that work in the X-ray room?

A. Yes; your table, your X-ray table is a nice size and you could just put down each sheet in a row across this X-ray table.

Q. That is these sheets that were added as you have previously described?

A. Yes; put them in a row.

Q. Automobile expense, and so forth?

A. In alphabetic, put the headings down in a row.

Q. Was there any other reason for going to the X-ray room besides the large table?

(Testimony of Raye Way.)

A. Yes, sir.

Q. What was that?

A. With the X-ray room it was toward the back and we had intercommunication and the technician would sit at the desk as we were doing that work and any patient that came in the [144] office or the doctor was wanted on the 'phone she would buzz us in the room and say, "Mr. or Mrs. so and so is in to see you." We would leave the sheets in there so they wouldn't be disturbed, he would take care of the patient and if there was any receipt I had to issue I would take care of that. When there weren't any patients in the office we would go back again to the X-ray room.

Q. That was in part to keep from being disturbed by the coming and going of the patients?

A. Yes, sir. They weren't disturbed in there unless there was an X-ray to be taken.

Q. I take it from your period of employment you probably assisted the doctor in the preparation of his income tax data for 1947, which would have been done in the Spring of 1948, and also for the year 1948 which would have been done in the Spring, 1949, you helped him in two of those years involved in this case?

A. Yes.

Q. Now, will you describe in a little further detail exactly how the tabulations were made on these sheets which you had spread out on this X-ray table. I want to have a little better picture of just how you worked, who did what, and so forth?

(Testimony of Raye Way.)

A. I sat at the X-ray table and the doctor sat at his desk in the X-ray room and he read the name and the amount of [145] a check; if it was familiar to me, I mean, what heading I should put it under, like "telephone account," Mountain States Telephone, I would call which heading it would go under and he would read off the name and the amount of the check and then also he would use the daily log book for the expenses that were listed.

Q. You are referring to cash expenses when you say he used the daily log book, that was cash outlay that might be paid out?

A. Yes. Like he might pay a yardman, take it out of my cash box; as soon as I gave him the money I would enter it in that expense sheet in the daily log.

Q. What did Dr. Lutfy ordinarily read from in reading off these checks, did he read from the stubs of checks made out of the regular check book?

A. Stubs—well, his back would be turned, you know, and I know he had a check book on that table and a daily log and he would read, he would read the amounts off.

Q. The payee of the check and amount?

A. Yes, sir.

Q. Do you remember if he read from the cancelled check itself or stub, or both, or what was his practice?

A. Well, all I know is the stub. I couldn't say.

Q. How about counter checks though, a check might be written and I assume there might be some

(Testimony of Raye Way.)

when Dr. Lutfy would [146] be out of the office, might write a check, I refer to those as counter checks, meaning only it would not be a check that came out of his regular check book. There wouldn't be any stub for that. Do you recollect he read from the cancelled check itself?

A. I don't know. All I know I was intent on those headings and putting the figures down.

Q. You were intent on getting them down as accurately as possible? A. Yes, sir.

Q. And you would, as you say, in some cases where you knew or felt you knew where the item belonged, in which of the expense columns it belonged, you would put it there? A. Yes, sir.

Q. And other cases you might have to ask Dr. Lutfy which column to put it in? A. Yes, sir.

Q. An item like, for instance, "Coulter," what would that mean to you?

A. The name is familiar, Coulter automobile, would be automobile repair.

Q. And you would probably put that down without asking? A. Yes.

Q. In the automobile expense?

A. Yes, sir. [147]

Q. I assume the extent of the accuracy would depend in part upon your correctly understanding or hearing him as he read off the items?

A. Yes, sir.

Q. You did not yourself during the compilation of these items, you did not yourself examine the checks? A. No, sir.

(Testimony of Raye Way.)

Q. You simply depended on your hearing?

A. That is right.

Q. His reading them off?

A. That is right.

Q. And hearing them accurately?

A. Yes, sir.

Q. And being able to put them in the proper column?

A. Yes, sir.

Q. And you did that as accurately and to the best of your ability?

A. Yes, sir.

Q. And then you explained that when the column was completed, I mean when it had been gone through, then you ran them up on an adding machine and attached the tape to the particular sheet?

A. Yes, sir.

Q. And then what was done with those sheets?

A. They were given to Dr. Lutfy. I took them into his [148] office and put them on his desk.

Q. And was a sheet set up or figure arrived at for his income, his gross income for the year?

A. When I was finished with that that is all I was interested in.

Q. That is all the part you had to do with it?

A. Yes, sir.

Q. And he supplied the accountants?

A. Yes, sir.

Q. Mrs. Way, is it not a fact Dr. Lutfy prepared a statement of his income, his gross income, by referring to this daily log, and that he listed that for the accountants month by month from the log?

A. At the end of each month—at the end of each

(Testimony of Raye Way.)

day that the cash, the received on account, the columns, those three columns were totalled up and the totals were put at the end of each day. Then at the end of each month——

Q. It was brought forward, the accumulated totals were brought forward?

A. Yes, sir; month after month throughout the entire year.

Q. You did that? A. I did that.

Q. You did that with the same degree of care and accuracy to get it correct and proper amount of his total income there, [149] you did that with the same degree of accuracy? A. I did that.

Q. Is it not true that Dr. Lutfy during part or some of the time you were there had some rental incomes that came in?

A. There was a folder and it was marked, "rentals." It was my task to draw—and I can remember well—there was a doctor had office space in our office until he moved to the office next door. That was a rental. There was a musician in the back——

Q. That was Mr. Montegeaux Matchel?

A. Montegeaux Matchel.

Q. That was 307?

A. That was at the back of our office.

Q. A little house? A. A little house.

Q. In the rear and somewhat west of the office building?

A. Yes. Most of the time that place was rented and it rented, it was used as a dancing school, that

(Testimony of Raye Way.)

is how I remember, for just a short time as a rental.

Q. I am not quite clear how you handled these rent checks that came in from the rentals you described. You say you put those in the folder?

A. You mean the checks?

Q. Yes.

A. The checks were just put in my drawer; then when we [150] counted up our cash during the day, didn't count those rentals in it. Dr. Lutfy took those checks.

Q. They were not deposited along with the office receipts? A. I didn't bother with those.

Q. You didn't have anything to do with those?

A. No.

Q. Just for patients. Mrs. Way, you know, as a matter of fact, the rent checks were deposited in the bank but weren't entered on the daily log because they were not professional income?

A. That is right. I did not enter them in any book.

Q. Now, Mrs. Way, I would like to ask you whether or not Dr. Lutfy ever at any time suggested that you omit any item of income or business, professional income there from the records or ever instruct you to resort to any deceptive device of any kind? A. No, sir.

Q. And did he ever at any time insinuate or suggest such a thing? A. No, sir.

Q. And during the entire period of your employment there was your instruction from him the

(Testimony of Raye Way.)

same, that is, you keep complete and accurate records there of the business in that office?

A. Yes, sir. If I wouldn't have I would have been [151] discharged the first month. It was really a probationary period.

Mr. Parker: That is all.

Redirect Examination

By Miss Reimann:

Q. You said you visited Dr. Lutfy's home on Maryland Street. Have you visited at his home where he lives now?

A. I had when I was in Phoenix with my little boy, I called up Mrs. Lutfy and went to his home.

Q. When was that?

A. In December, before Christmas.

Q. This year? A. That is 1953.

Q. Was it different—

Mr. Parker: I beg your pardon. I didn't mean to interrupt the lady. This is all obviously irrelevant and it would be prejudicial and could serve only that purpose, because his present home was built since his wife came into her inheritance and is built on borrowed money and a few other things, but it is far after this period with which we are concerned here.

The Court: The objection is sustained.

Q. (By Miss Reimann): Returning back to our X-ray table and room where we compiled all these figures, when Dr. Lutfy read off these amounts to

(Testimony of Raye Way.)

you you stated he did it from out of his check book, is that right? [152]

A. From the check book and I surmised it would be the stubs.

Q. At any time when he was reading off these figures did you have the check book in your possession or check the figures in any way?

A. No; I was busy with the headings. I sat at the desk on the other side.

Q. You copied off any figure he read to you, is that correct?

A. That is right; under the proper heading.

Q. And if you didn't know what heading it went under, he told you where it went?

A. That is right.

Q. And you put it there? A. Yes.

Q. And you are not hard of hearing, are you, Mrs. Way?

A. I don't think so, when I am not disturbed.

(Government's Exhibit 27 marked for identification.)

Q. (By Miss Reimann): I would like to show you Government's Exhibit 27 for identification and ask you if you can recognize that, if you had anything to do with it, and ask you if you recognize the writing on the bottom of it as to who wrote it?

A. This is Dr. Lutfy's writing.

Q. Have you seen his writing many times? [153]

A. He had to sign everything, all my work.

Q. And you feel from your observing his writing

(Testimony of Raye Way.)

the times that you have you can definitely identify that as his writing?

A. I am not too sure of this, but right here, this depreciation, I can definitely say that is his writing.

Q. On this page did you do any of this typing here? A. Well, it is the same typewriter.

Q. Do you recall doing that particular part or is it too long ago?

A. 1947, the only thing I can say, if it is 1947 I worked there so it must have been my typing. That is the only way I can tell.

Miss Reimann: No further questions.

Recross-Examination

By Mr. Parker:

Q. Do you remember what time in 1947, what period of the year you went to work for Dr. Lutfy?

A. In 1947?

Q. Yes.

A. I think it was after Labor Day, the first day after Labor Day, because I remember it was a holiday and I couldn't report to work at that time.

Q. Then it would not have been the first, it was after the first Monday in September, 1947?

A. Yes, sir.

Q. That you went to work for him for the first time? [154] A. Yes, sir.

Q. You had not prior to that time worked for him at all? A. No, sir.

Mr. Parker: That is all. [155]

EDWARD J. BAMRICK

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Roylston: [160]

* * *

Mr. Roylston: I will reoffer Government's 32 for identification.

Mr. Parker: I should like to urge the objection which I have in mind, your Honor.

The Court: Members of the jury, counsel has some legal matter that wants to be presented and passed upon at this time that can properly be done only in the absence of the jury. At this time I will have to ask you to retire, and remain outside of the courtroom until you are called back.

(Whereupon the jury retired from the courtroom.)

The Court: The record may show that the jury is entirely withdrawn from the courtroom, and the defendant is present, and the defendant's attorney and the United States attorney are present.

Mr. Parker: If your Honor please, I direct the Court's attention to the last page of the exhibit. This is a loan application. It appears clearly when you contrast the values [162] which are set up, that they are referring to present market values rather than values based upon costs. These same items of real estate are described in the longest of the two

stipulations which have been introduced here, and the cost of the real estate.

Now, I have in mind in this connection that many business men, farmers and others will, for instance, carry a piece of land or other item of property on their books at a book value representing roughly their cost. They may have bought the land sometime ago. They may be carrying it at \$100 an acre whereas it may bring on today's market 300 or 400. It is quite obvious that this exhibit—and we have not yet gone into the manner in which it was prepared—predicts certain values upon an estimate of present market value, and that that is not the basis that is proper here. It does not correspond with and is in conflict with the stipulations which have been entered into.

It is a matter of common knowledge that almost everyone in making an application for a loan is likely to use whichever method of arriving at the valuation of his property that will result in the largest type of result.

It seems to me that this exhibit would be prejudicial; that is in direct conflict with factual material here which we have stipulated to. If your Honor will notice this exhibit 29, we go through all these real estate transactions, and we [163] have them typed right down to actual costs, and where the property was sold in the particular year, we have it tied down to the actual sale value. It was my understanding all the way along that that was the method the Government adopted. For want of any other

alternative, we have, of course, adopted the same basis for computing values.

This exhibit obviously, in my opinion, is put in for the purpose of prejudicing the defendant and obviously also a situation where an entirely different method of values was used.

We can take the farmer or business man, for instance. He is carrying his property for \$100 an acre. That is what he has in it. He can carry it at that but if he went to the bank to make a crop loan he would probably put it at \$300 or \$400 an acre, whatever it was worth at that time; but that does not render his book value wrong, is illegal or anything of that sort. He is not called to account for that present market value until he sells that property. Then he is called to account for that present market value.

Mr. Royston: I might save some time if I can interrupt counsel. I suppose I should have made it a little clearer as to what the purpose was in offering that. It was the statement signed by the Doctor what purports to be the net income from the Doctor's practice and the net rental income. I think Mr. Parker is right on the real estate part. [164]

Mr. Parker: I think it is not only the last page. I think the last page is a breakdown of other figures. I miscomprehended counsel's purpose in offering it. I would say for impeachment it might be proper. I don't believe it is proper at this time. I mean, the Doctor wasn't making any income tax return. He didn't have to make a return of his income to the

life insurance company to whom he was applying for a loan. The figures I notice are modest.

The Court: I suggest you look at it exclusive of the last page and see if you have objection to that.

Mr. Royston: Actually, we would be willing to take off that first page. I don't think it has any bearing, and the only page we are interested in is the page that purports to be Dr. Lutfy's signature.

Mr. Parker: On that, if the thing you are interested in is only his statement of income, and we get away from these possibly entirely different basis of evaluations, I think we should have to eliminate the top half of that page.

Mr. Royston: That is right. The part listed "assets," we could either cover that or agree that the jury won't be read anything.

The Court: I think you should cut it off.

Mr. Parker: That would go a good way—I mean there would be less prejudice in the exhibit if that could be cut off or covered or something. [165]

The Court: May I see it, please?

(Counsel approach the bench. Discussion out of the hearing of the reporter.)

The Court: Do you have objection to Exhibit 36 as it is now constituted?

Mr. Parker: The objection that I have is that I expect to show that this was done very casually; that it was typed by Mr. Bamrick; that Dr. Lutfy had no records; that it was an obvious guess.

The Court: It is still a matter of cross-examination.

Mr. Parker: Yes, it is a matter of cross-examination.

Mr. Roylston: I will recall Mr. Bamrick to the stand.

Mr. Parker: My objection actually goes only to the weight rather than to the admissibility and is predicated on circumstances surrounding the making of this document or exhibit.

The Court: When the jury comes in, I propose to admit Exhibit 32 as now constituted. Mr. Bamrick, will you resume the stand?

(Whereupon, the jury returned to open Court.)

EDWARD J. BAMRICK

previously called and sworn, resumed the stand.

The Court: Government's Exhibit 32 for identification will be admitted as Government's 32 in evidence.

Direct Examination
(Continued)

By Mr. Roylston: [166]

Q. If I might at this time read Government's 32 to the jury.

(Government's No. 32 was read to the jury.)

Mr. Roylston: —“number of persons wholly dependent upon me”—I won't read the rest.

Cross-Examination

By Mr. Parker:

Q. Mr. Bamrick, during what period of time were you employed by Bert Cavanagh Realty?

(Testimony of Edward J. Bamrick.)

A. From December, 1945, until December 31, 1951.

Q. During that period of approximately six years, what capacity did you occupy with them?

A. I was manager of the mortgage loan department of that office.

Q. They maintained that as a service to their clients, a mortgage loan department?

A. Well, if you wish to call it that. If I might elaborate, it was not only a service to their particular clients from a brokerage standpoint, it was a mortgage loan business, more or less separate and apart from the other operation of the office.

Q. Were you employed in that capacity during the entire time you were with Cavanagh Realty Company?

A. All, excepting from about December 8, 1945, until approximately the 15th of May, 1946. [167]

Q. As I understand it, the Cavanagh Realty Company did not loan money on mortgages, but simply processed loans where the money was being loaned by banks or insurance companies and the like; was that the method?

A. That is correct. In this particular case, they were the designated correspondents for Northwestern Mutual Life Insurance Company on any loans that were submitted to Northwestern Mutual Life.

Q. In that capacity as manager of the mortgage loan department, one of the functions which you regularly performed was assisting applicants for

(Testimony of Edward J. Bamrick.)

mortgage loans in filling out applications for such loans, was that not true?

A. Yes. You have to assist them in some method.

Q. In this particular case, I am referring to this Exhibit No. 32. Do you remember typing that yourself?

A. I couldn't remember that. That was six years ago and much has happened to me since then.

Q. You do not remember whether you personally typed it or not?

A. In all probability I did because I handled most of the particular work myself. It was primarily, let us say, a one-man operation.

Q. Do you recall that at the time you filled this out for Dr. Lutfy, these figures respecting income were arrived at rather casually or loosely, were they not? [168]

A. That I would not know, counsel, because they would necessarily have to have them furnished by the Doctor. I wouldn't have no way of knowing.

Q. He had no records of anything of that sort with him that you remember?

A. I wouldn't recall, no, sir.

Q. You don't remember?

A. No, sir, I don't remember.

Q. Do you remember that he told you at the time that it was just a guess, that his practice—this was in May, 1948—that his practice was increasing and that this was just a guess?

A. He may have done so, I could not recollect.

Q. Do I understand correctly, Mr. Bamrick, that

(Testimony of Edward J. Bamrick.)

due to the fact that this was some years ago, and that you have handled quite a number of these applications for loans, that you don't have any independent recollection at this time of the interview at the time this loan application was prepared by you?

A. No, I could not have a clear recollection, counsel. When I departed from Cavanagh Realty in Phoenix, all the files in those particular cases, and all the cases I handled, remained there, including all rough notes and memoranda.

Q. You have no access to those files?

A. Oh, no.

Q. Based on your experience here in handling those applications for mortgage loans, did you observe any disposition [169] on the part of applicants at times to exaggerate their incomes a little bit to make sure they were going to get the loan?

A. That could have been done but they certainly wouldn't reflect that to me because they knew I was representing Northwestern Mutual and also represented other insurance companies.

Q. Mr. Bamrick, in handling these applications, you didn't put the applicants under oath, you just simply took their word for what their income would be?

A. He or she, that is the case.

Q. You had no way of knowing what a particular applicant had in mind, whether he had in mind the future or the present moment, or whether it was estimated, anticipated income during the period of

(Testimony of Edward J. Bamrick.)

the loan, or just what he had in mind; you had no way of knowing that?

A. I would have no way, no, sir.

Q. You didn't require the applicant to produce any documentary proof to show by any documentary evidence what his income was; you simply took his word for it?

A. If a client is a reputable person and sufficiently so, I would submit an application for a loan to my company that that man is a substantial person as far as I am concerned.

Q. And he is giving you a reasonably accurate approximation of his income? A. Yes, sir.

Q. That is all you require? [170]

A. Yes. You put a person under oath and he would walk out. You wouldn't have any business.

Q. A reasonable accurate approximation is all you were interested in? A. Yes.

Mr. Parker: That is all.

Redirect Examination

By Mr. Royston:

Q. Did you send this application on to the Northwestern Company, Mr. Bamrick?

A. Oh, yes. I sent it to the Los Angeles office, which is the procedure. The Los Angeles office apparently reviews the whole file and submits it to the Board of Northwestern Mutual Life in Milwaukee.

Q. At the time you forwarded the application,

(Testimony of Edward J. Bamrick.)

did you have to either recommend for or against the Company making the loan?

A. We recommend or consider a standard for a loan as reflected in the application.

Q. You so recommended in this particular application?

A. A loan of \$15,000 based on that property as collateral for the loan should be considered by the Board.

Q. When you made that recommendation, was one of the things you relied on the honesty of the statement contained in the document? [171]

Mr. Parker: There is no charge of anything fraudulent. The Insurance Company is not complaining about the loan. I don't think this is a proper line of inquiry.

Mr. Royston: This is what Mr. Parker brought out concerning whether the person was under oath and what the statement consisted of. I am going a little further into it.

Mr. Parker: I don't think there is any issue whether the Insurance Company relied on any statements on income or collateral. The witness just indicated the collateral was pretty good.

Mr. Royston: Let me withdraw that question.

Q. (By Mr. Royston): When you forwarded this application on with your recommendation, did you know that the statement that Dr. Lutfy signed, he understood the statement, "I represent that the following is a true and correct itemized statement of my assets and all my liabilities and also my present

(Testimony of Edward J. Bamrick.)

income and expenses"; did you know the document contained that statement?

A. Why, sure. [172]

* * *

Mr. Royston: At this time, if it pleases the Court, I guess I might as well read some of these stipulations to the jury. These have to be read sometime so we might as well do it now.

Mr. Parker: Are these to be read in the order in which they are marked?

Mr. Royston: I will read 29 first. I am not reading from Government's Exhibit No. 29.

(Government's Exhibit No. 29 was read to the jury.)

Mr. Parker: I think there is purely one clerical error in stipulation No. 5. Where it is 7-19-46, \$244, that should be 47. It should be 7-19-47, \$244.

Mr. Royston: That is right. I think that is correct. It will be corrected by interlineation.

Mr. Parker: The 6 should be off.

The Court: Is there a stipulation correcting it?

Mr. Parker: Yes.

Mr. Royston: Yes. If I might proceed now to read Government's Exhibit No. 30 which is another stipulation.

(Government's Exhibit No. 30 was read to the jury, and during the reading of the exhibit the following took place):

Mr. Parker: Just a moment. I beg your pardon to interrupt, but your office drafted this stipulation, and it was not my intent to do more than stipulate to the payments, [173] not to any legal conclusion as to whether these were personal or not. Those were all agreed in No. 29. I don't know if you misunderstood me or if the stenographer just followed the other form of the introductory paragraph. I notice now for the first time it refers to this as personal. We admit the expenditures and want the stipulation to so show, but there are some of these that may or may not be deductible as business or professional expenses. It was not our purpose to stipulate as to a legal conclusion about these. In the other stipulation, it was our purpose to stipulate those were personal expenses, but not on this one, and I had not observed at the time it was handed to me across the table. I rather hurriedly signed it without reading carefully this introductory paragraph.

Mr. Royston: Then I misunderstood the stipulation because I thought we were making the same stipulation to these expenditures as to the other expenditures.

Mr. Parker: No. We were stipulating these expenditures were made, but I cannot stipulate, and I would be going contrary to the fact that they were all personal and had no business or professional.

The Court: We will take our morning recess at this time.

(Recess.)

Mr. Parker: If your Honor please, in this matter I think we are in agreement.

Mr. Roylston: Before we begin that, Mr. Parker indicated [174] he no longer needs these two witnesses. May they be excused?

The Court: Mr. Bamrick and Mr. Westring, you may be excused.

Mr. Parker: In this stipulation, if we could strike from the opening paragraph the words following "Louis P. Lutfy."

The Court: That would be beginning in the middle of line 17?

Mr. Parker: Yes, your Honor. To the end "conducted by him." Further, in connection with that matter, I suggested to Mr. Roylston as to the third item on the second page, we will stipulate that item as a personal expense not connected with his business or profession.

Mr. Roylston: I will so stipulate, your Honor.

The Court: Very well.

Mr. Roylston: I am now going to read Government's Exhibit No. 30, which is a stipulation. It has the same heading as the one I read before.

(Government's Exhibit 30 read to the jury.)

Mr. Parker: I didn't previously see the expression, "for household purposes."

Mr. Roylston: I will stipulate that can be taken out. I will start with No. 1 again.

(Reading to the jury.)

Mr. Roylston: There is one other stipulation and it is [175] marked Government's Exhibit 31. It has

the same heading as the other two, and it reads as follows.

(Government's Exhibit 31 read to the jury.)

Mr. Parker: Mr. Royston, will you pardon the interruption. In No. 47, there is a typing error. It should be 301 West McDowell Road, instead of 305 West McDowell Road.

Mr. Royston: May that be corrected by interlineation?

Mr. Parker: In 46, it was correctly stated as 301, but in 47, referring to the architect, it refers to 305, and it should be 301.

(Continued reading of Government's Exhibit 31.)

Mr. Royston: That completes the stipulations, your Honor.

The Court: Very well. [176]

* * *

HOWARD H. WHITSETT

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Royston:

Q. Will you state your name?

A. Howard H. Whitsett.

Q. What is your occupation, Mr. Whitsett?

A. I am an Internal Revenue Agent for the Treasury Department.

(Testimony of Howard H. Whitsett.)

Q. Will you speak a little louder, please?

A. I am an Internal Revenue Agent for the Treasury Department.

Q. How long have you been with the Internal Revenue Bureau?

A. A little over seventeen years.

Q. What type of work do you do with the Internal Revenue Bureau?

A. We audit income tax returns.

Q. Speak a little louder, please.

A. I audit income tax returns.

Q. In connection with your work in the Internal Revenue Bureau in auditing income tax returns, did you have occasion to ever check or audit the income tax return of Dr. Louis P. Lutfy?

A. Yes, I did.

Q. When was this matter of Dr. Lutfy's income tax return first [177] referred to you?

A. Sometime in the early spring of 1949.

Q. What particular tax return was referred to you?

A. The 1947 return of the Doctor and his wife.

Q. I will show you Government's Exhibit 3 and ask you if that is the return which was first referred to you for an audit or for further investigation?

A. Yes, sir, it is.

Q. When you first received that, what was the purpose of that return being referred to you?

A. Well, someone in the Agent's office that goes over these returns as they are filed and picks out the returns to be assigned to the various agents for

(Testimony of Howard H. Whitsett.)

auditing if there appears to be anything on the return that needs checking.

Q. It was assigned to you for further auditing, is that correct? A. That is right.

Q. When that return was first assigned to you, what, if anything, did you do?

A. I went over the return myself to see just what items were on the return and what items might be questionable.

Q. When you checked the return, did you find anything which led you to a further investigation?

A. Yes. I——

Mr. Parker: I think the question is [178] answered.

The Court: It has been answered.

Q. What was there on the return that led you to conduct a further investigation?

Mr. Parker: If your Honor please, I think this is going into what would amount to an opinion by the witness about the return. I am certainly not objecting to anything he did or what investigation he made or what he learned, any fact of that nature.

The Court: I think what he did is what is material here.

Q. Before we go any further into what you did in this particular case, you stated you have been with the Internal Revenue for approximately seventeen years, is that correct? A. Yes, sir.

Q. Have you ever previously testified in any Federal cases as an expert witness? A. Yes, sir.

Q. After you received this return, this 1947 re-

(Testimony of Howard H. Whitsett.)

turn, for further audit, what did you first do after you examined the return; what was the next thing you did?

A. I contacted the Doctor, contacted Dr. Lutfy and made an appointment with him to go over his books and records.

Q. When did you first talk to Dr. Lutfy concerning this 1947 return.

A. I made an appointment for April 20, 1949.

Q. Did you talk with Dr. Lutfy on April [179] 20th? A. Yes, sir.

Q. Where was that meeting between the two of you? A. In the Doctor's office at 301—

Q. When you met with the Doctor, was anybody present, other than you and Doctor Lutfy?

A. Not while we were discussing the returns and his books.

Q. Approximately what time of day was that, morning, afternoon or evening?

A. It was morning.

Q. On the morning of April 20th, and what year was that? A. '49.

Q. 1949. When you first contacted Dr. Lutfy in his office, relate to the best of your recollection what the conversation was between you and Dr. Lutfy at that time?

A. I asked him for the books and records he used to compile the figures for the return. He gave me the log book and some sheets of papers that he compiled his expenses off of; and the first thing we

(Testimony of Howard H. Whitsett.)

do on an audit is check those figures against the figures used in making the returns.

Q. Did you check the figures that Dr. Lutfy gave you at this first meeting against this 1947 return? A. Yes.

Q. What were the specific items you checked there in the Doctor's presence, if you remember?

A. He gave me the books, and went on about his practice, [180] and I checked the receipt from his business from the log book. I went over the expense items that were in the log book and checked the entries of the expenses against the expenses listed for his business, but then I didn't go over the checks because there was nothing but just figures, there was no way of identifying the various items to make up the expenses.

Q. There, on the morning of April 20, 1949, did you have any further conversation with Dr. Lutfy?

A. Yes. I looked over his depreciation schedule and saw there was a considerable amount of property listed as depreciable assets.

Q. Did you discuss those with Dr. Lutfy?

A. Yes. I discussed them with the Doctor. I asked him for verification of the costs of these items.

Q. Did Dr. Lutfy furnish you with any verification for any of the items listed there on the '47 return?

A. Yes. I asked him about the office building listed here, that he has the cost of \$30,000, and he gave me a folder.

Q. That cost of \$30,000, you got that from that

(Testimony of Howard H. Whitsett.)

'47 return? A. That is right.

Q. The Doctor gave you a folder?

A. He gave me a folder of the contracts he had let to contractors for all the expenses with the dates of payments and so forth, going to make up the cost of this. I added this all up and it only amounted to around \$20,000, a little over [181] \$21,000.

Q. Did you call that to Dr. Lutfy's attention at that time? A. Yes, I did, and I asked him——

Q. Go ahead and relate that conversation.

A. I asked him where the rest of the costs were that went to make up this \$30,000. He said that after the office building was built he had some changes and additions to things and took me around the office and showed me a new drinking fountain, he had to have a metal door put in the X-ray room and a special type of plate for his X-ray room; a few small items but didn't, to my mind, add up to \$9,000.

Mr. Parker: I move to strike the last statement of the witness.

The Court: It may be stricken, that part of the answer, "didn't, to my mind, add up——"

Q. After he showed you this drinking fountain and the metal door, did you discuss any further costs of the building as it was listed on his '47 return for depreciation purposes?

A. Yes. I asked him if he had any idea when he let the contract for around \$21,000, if it would cost him another 50% of that to complete it so it would

(Testimony of Howard H. Whitsett.)

be the way he wanted it. He said, "No," he had no such idea in mind at that time.

Q. Did you ask him anything in regard to the land on which the building was located?

A. I asked him if he included the cost of the land. He said, "No, definitely not," he knew better than that. [182]

Q. After you totaled those figures to around \$21,000, and had this further conversation there with the Doctor, did you discuss any other items on that '47 return?

A. Yes. I asked him about medical equipment, new, as \$13,000, and X-ray equipment listed as \$7,000.

Q. Did he reply to that question?

A. He had very little in his files to substantiate that total of \$20,000; he again took me through the office and showed me some medical instruments—"this one cost \$300, this one \$500, you can see how much I have. It amounts to quite a bit of money." I asked him if he had anything to show me when those were purchased to prove they hadn't been deducted as expense in the year in which they were purchased and not capitalized, and since he didn't have it on hand at that moment, I would have to get the bills and statements from the various surgical supply houses, so that we could verify the figure and check it against the expense accounts he had listed for those years and for the year they had already been deducted as expense, and if the total of them would add up to \$20,000 as claimed.

(Testimony of Howard H. Whitsett.)

Q. After this first meeting with Dr. Lutfy, what was the next thing you did in connection with any investigation with this case?

A. I then went to the county records and checked. He had several rental houses here, and I checked the purchases and [183] sales of properties and any liens on mortgages. I went to the banks and totaled the bank deposits for the two or three years, including '47—'46, 47 and '48, to see how close his total bank deposits came to his total receipts as reported on the return, and they were somewhat larger. It was at that time that I stopped my investigation and waited until we could have a joint investigation with the Intelligence Unit.

Q. Explain a little further what you mean by "joint investigation"; just what that is?

Mr. Parker: I anticipate the witness is about to express his opinion about the case, what the agent did, and thereupon having arrived at a conclusion he turned it over to somebody else. I take it this witness has probably testified in many courts and understands that the defendant should not be prejudiced by his opinions regarding the merits of the case.

Mr. Royston: I will withdraw that question.

Q. You stated that you stopped your investigation until there could be a joint investigation with the Intelligence Unit? A. Yes.

Q. What is the Intelligence Unit?

A. The Intelligence Unit is the branch of the

(Testimony of Howard H. Whitsett.)

Treasury Department that does the investigation in the cases of fraud or——

Mr. Parker: If the Court please, the witness is now stating [184] his opinion about the case.

Mr. Royston: He is stating what the Intelligence Unit is.

Mr. Parker: It is immaterial.

The Court: It may stand.

Q. After you referred the matter for joint investigation, what was the next thing that occurred as far as you were concerned?

A. It was sometime early in '51, I believe around the 4th of January, from there until about the end of April, we had Mr. Tucker, the Special Agent assigned to work with me, and had eleven conferences with the Doctor.

Q. You state Mr. Tucker was assigned to work with you?

A. Mr. Tucker of the Intelligence Unit.

Q. Mr. Tucker was from the Intelligence Unit?

A. That is right.

Q. You are from——

A. The Internal Revenue Agent's Office.

Q. Internal Revenue Agent's Office?

A. Yes.

Q. Then, in January of '51, was when this joint investigation began? A. That is right.

Q. At the time you started your investigation, were you investigating this 1947 return or were you investigating other [185] returns as well?

A. No. In the interim I had requested the re-

(Testimony of Howard H. Whitsett.)

turns from 1943 through 1948. That was the period covered by my technical investigation.

Q. Had you received the returns for that period?

A. That is right, I had.

Q. By January of 1951? A. Yes.

Q. You stated that you and Mr. Tucker then had eleven conferences with the Doctor, is that correct?

A. That is right.

Q. Approximately what period of time did these series of conferences cover?

A. January through, into April, I believe.

Q. In the year '51? A. '51.

Q. Where were these conferences held.

A. Most of them in the Doctor's office and two or three of them at the Internal Revenue Office in Phoenix.

Q. At these conferences, was anybody present other than you and Mr. Tucker and Dr. Lutfy?

A. Two of them, Dr. Lutfy's accountant, Mr. Racey, was present.

Q. Mr. Racey? A. Mr. Laird Racey. [186]

Q. That was Dr. Lutfy's accountant at that time?

A. Yes.

Q. During this period did you ever have occasion to examine Dr. Lutfy's office records in connection with his income from his professional practice?

A. Yes. In the first meeting with Dr. Lutfy in January, Mr. Tucker asked him to get copies of his bank deposit slips because we were unable to read his handwriting. He did this and we contacted him later and went over these deposit tickets and he iden-

(Testimony of Howard H. Whitsett.)

tified the names and whether they were the checks listed for rent or for patients' receipts, various others.

Q. There has been some testimony concerning a log book that was kept in the doctor's office; did you examine that?

A. After we had identified these names as nearly as possible on the deposit tickets, we compared them with the log book, and we compared them with the patient record cards.

Q. What do you mean by patient record cards?

A. I think the witness yesterday explained that when the patient comes in there is a card made out and the charges are listed on those cards and the visits that are made on the cards.

Q. That is the same set of cards Mrs. Way testified to yesterday? A. Yes.

Q. Did you examine any other records in connection with his profession? [187]

A. We examined the receipt books and also went through the checks.

Q. You state you examined the bank deposit slips, the log book, the patient cards and the receipt books, is that correct? A. That is right.

Q. What were the results of your investigation in connection with those four different methods of bookkeeping?

A. We found names and amounts on the deposit tickets we didn't find on the log book or on the patient's cards or on the receipt books. We found

(Testimony of Howard H. Whitsett.)

names in the log book we didn't find on the deposit tickets or on the patient's cards nor on the receipt books. We found names on the patient's cards, we found names and amounts, we didn't find were on the log book or were on the bank deposit tickets; and it was at that time that we discussed this with the Doctor and he said that evidently the log book was not complete, as we showed him patient receipts that weren't on it. He had destroyed some of the patient's cards that weren't regular patients and the receipts were only made out for the credits received directly into the office, not from mail receipts; so that no one record was complete enough to be positive that that was the entire receipts from the practice; and it was at that time we were forced to proceed on the net worth basis of arriving at the Doctor's income for the years in question.

Q. At the time you discussed the different methods of bookkeeping [188] with Dr. Lutfy, did you inquire of the Doctor if he had income from any other business or enterprise?

A. Yes. We had run onto some receipts on the deposit tickets from the Phoenix Sport Shop. We asked the doctor what that was for and he said, "For some cameras or guns or athletic equipment of that nature he had sold to the Phoenix Sport Shop." We looked in the phone directory and the City directory and found no record of a Phoenix Sport Shop. At a later date we asked him what the Phoenix Sport Shop was, and he said that was his own business. He had brought out stationery at that time that

(Testimony of Howard H. Whitsett.)

was headed "Louis P. Lutfy Company," and he said, "Now I am using this name because I had some difficulty getting my mail here at the doctor's office addressed to the Phoenix Sport Shop, that it confused the Post Office Department," so he changed his letterhead from Phoenix Sport Shop to Louis P. Lutfy Company, and he sold cameras, guns, sporting equipment to various people and purchased through this company name.

Q. This is Government's Exhibit No. 26 for identification; you testified that the Doctor showed you some stationery. I will ask you if that is what the Doctor showed you at that time?

A. Yes. He went through his desk and brought out this sheet of stationery to show us how he had that.

Mr. Royston: We will offer this.

Mr. Parker: I have no objection.

The Court: It may be admitted. [189]

A. We then asked him if he had—am I supposed to go on?

Q. Did you have any further discussion with Dr. Lutfy at that time concerning any books or records of the Phoenix Sport Shop?

A. He had a file of correspondence, but there was no book—we had no record of—a complete record of receipts. We asked him if he had a bank account and he said, "Yes, he had a bank account in the Bank of Douglas in the name of Phoenix Sport Shop." Up to that time we asked him if he had any other bank accounts and he said, "No." We

(Testimony of Howard H. Whitsett.)

had all the records of the bank accounts he had but there was none. We were unable to get any clear listing of the purchases or sales to this Phoenix Sport Shop or Dr. Lutfy Company.

Q. After Dr. Lutfy told you he was the Phoenix Sport Shop, did that enter into your consideration whether you should resort to the net worth method of computation in this?

A. Yes. We had no way of figuring whether there was any income from that at all because there were no records whatsoever.

Q. You stated that you resorted to the net worth method of computation after you examined the Doctor's books and records and had discovered this Phoenix Sport Shop. Explain to the jury what you mean by the net worth method of computation.

A. On the net worth method, you take the known assets of an individual at the end of a year and strike the total assets [190] he owned at the beginning of the year. This difference, plus any expenditures for personal items that wouldn't result in having an asset like notes and mortgages or property, is the income of the taxpayer for that year, and that income he should report on his return for income tax purposes.

Q. In this method of computation you state that you considered the assets of the taxpayer. Do you also consider the liabilities of the taxpayer?

A. You take the net value, net cost or investment in all the assets, that is the cost price less any

(Testimony of Howard H. Whitsett.)

amounts owned against that on any asset, loans or mortgages.

Q. State to the best of your ability in preparing the net worth statement in the case of Dr. Lutfy's tax returns, state just what items you used in preparing the net worth statement?

A. You use the ending balances of each year in all the bank accounts, the amount of investment in any piece of property, the cost less any amounts owned against that property, any notes or mortgages he owns, any automobiles, and as in the case of Dr. Lutfy, any medical equipment; then you take away any loans or mortgages and that in effect gives you the net value of his net worth at the end of each year.

Q. I will ask you whether you used all these items and from them prepared a net worth statement?

A. Yes, I did.

Q. Do you have that net worth statement with you now? [191]

A. No, I don't.

Q. Is this a typewritten copy of the net worth statement which you computed in connection with this case?

A. Yes, it is.

Q. This is a typewritten copy of that?

A. Yes.

Q. Government's Exhibit 33 for identification. You state this is the statement you prepared in connection with Dr. Lutfy's net worth for what period; did you state the period?

A. The period '46, '47 and '48.

(Testimony of Howard H. Whitsett.)

Mr. Roylston: I will offer Government's Exhibit 33 for identification into evidence.

Mr. Parker: If the Court please, this is rather a lengthy document and I haven't seen it before. It will take a little time to check it through. Can we reserve objection on it now until we have a chance to look at it?

The Court: I can appreciate the need to examine the record.

Mr. Parker: I don't want to hold up the trial of the case.

Mr. Roylston: What I want to do is have the witness testify from this statement. I am up to that point now and can't go any further.

Mr. Parker: If I might have a few minutes—I hate to say I can check this in three minutes but I will try. [192]

The Court: We won't require you to do that. Ladies and gentlemen, this is one of those necessary delays that happens sometimes and we regret always to have to interrupt a trial, but it is necessary sometimes in order to properly try it. It is necessary that we recess for a short time now, so we will stand at recess until 2:30.

(Recess.)

HOWARD H. WHITSETT

previously called and sworn, resumed the stand and testified further as follows:

Mr. Parker: If the Court please, with reference to Exhibit No. 33 for identification, right now I would register an objection to the fourth page of it which is not a part of the net worth statement at all. It is something else apart from the net worth statement. The first three pages is what the witness described the exhibit to be. The fourth page is a horse of an entirely different color and we object to that. I would like to ask the witness a question or two on voir dire with respect to the first three pages. Your Honor will observe that the net worth statement the witness described begins on page three, but before the exhibit is marked, as to the first three pages I would like to ask some questions on voir dire.

The Court: Do you have any objection to separating this, Mr. Royston? [193]

Mr. Royston: No, sir. We can just pull it off.

The Court: It will have to be re-marked.

Mr. Royston: Maybe if I can ask another question or two from this witness I can get the fourth page in now and won't have to pull it off.

The Court: Let us handle it this way: We will let Mr. Parker examine.

Examination

By Mr. Parker:

Q. The voir dire question I wish to ask, particularly if I may—Mr. Whitsett, I observed in this

(Testimony of Howard H. Whitsett.)

document labeled Exhibit 33, for each of the periods that are involved in this case certain items are labeled "cash on hand," which appear to be arbitrary. Is it true that those sums are an arbitrary assumption? A. Well, in one of the——

Q. Can't you answer that yes or no?

A. No, I am afraid not.

Q. It would be arbitrary or otherwise?

A. It was the Doctor's estimate of his cash on hand he gave to us at one of our conferences.

Q. Which one of the conferences?

A. March 16, and Mr. Racey was present that day.

Q. '51? A. '51, yes.

Mr. Parker: That is all of the voir dire. [194]

Direct Examination
(Continued)

By Mr. Roylston:

Mr. Roylston: I will offer Government's Exhibit 33 for identification into evidence.

The Court: Do you object to it, Mr. Parker?

Mr. Parker: Well, I have no objection to it as a hypothetical computation. I don't want to be in the position of conceding correctness of all the figures in here because there have been no original records brought into evidence to establish these other than the stipulations. Insofar as the stipulations cover them, they are admitted, but——

The Court: Isn't that what this is, the witness'

(Testimony of Howard H. Whitsett.)

opinion based upon what he concedes to be in evidence in the case?

Mr. Parker: Yes, that is what it is. I just want to keep that clear otherwise we can be swept away in a hypothetical situation and find ourselves in very great trouble getting back to the bank of the stream.

The Court: Are you getting at the proposition that you want to make it clear you are reserving your right to cross-examine as to the authenticity or accuracy of the figures what these support in the evidence?

Mr. Parker: And to put on my own accountant to show these computations aren't quite proper.

The Court: You certainly have those rights. It will be admitted as 33 in evidence. [195]

Mr. Royston: If the Court please, I am going to question the witness concerning this net worth statement now, and I have carbon copies of this statement which I would like to distribute to the jurors so they can follow what the witness is talking about. I will take the fourth page off of the copies.

(Counsel hands papers to jurors.)

The Court: The pages are numbered at the top, so if there is any reason for having page 4, you should separate it and hand it back.

Q. (By Mr. Royston): Now, Mr. Whitsett, in regard to this net worth statement, Government's Exhibit No. 33, will you start out from the very first of that and explain what the different items are on it and how you arrived at those figures, and as we go along, there will be a few items I want to

(Testimony of Howard H. Whitsett.)

ask specific questions about, but if you start under assets and explain how you set it up and tell us what each item is?

Mr. Parker: Although it may be a little bit slower, it would be far easier to make intelligent objections if this could be by interrogation rather than turn the witness loose and say, "go ahead, say anything you want to about this exhibit." It is rather a long one.

Mr. Royston: He can talk about anything on there, and anything else I will interrupt.

The Court: I will permit you to proceed as proposed. [196] However, if the witness goes beyond what he has been asked, counsel can object and if that happens we can probably do it by question and answer.

Q. (By Mr. Royston): Starting right out with the first item under assets there, explain just what those different columns are across there?

A. The columns are the year-end balances for the years ending 12-31-45, 12-31-46, 12-31-47, 12-31-48.

Q. Under assets you have a Roman Numeral No. I, headed Cash on Hand, and in Banks, and the first cash on hand. Explain what is meant by that statement, "Cash on Hand"?

A. Cash on Hand would be currency in the possession of the individual rather than assets represented by property or cash deposited in a bank account.

Q. It would be currency?

A. Currency, yes.

(Testimony of Howard H. Whitsett.)

Q. Where did you obtain these figures you used in that cash on hand?

A. Those were obtained from the Doctor's statement at this conference on March 16th, in the office of the Internal Revenue, where Mr. Tucker and Mr. Racey and Dr. Lutfy and myself were present.

Q. Did you do any other investigation in an attempt to establish whether these figures would be the approximate cash on hand? [197]

A. Yes, I did.

Q. What other investigation did you do outside of the Doctor's statement?

A. In my examination I had the 1943 returns, '43, '44 and '45. And I had the Office of Collector of Internal Revenue search their files and they gave me the information on the taxes paid as far back as the Doctor had ever filed tax returns.

Q. I will ask you if that information you obtained from your bureau concerning previously paid taxes are the same as Government's Exhibit 13 and Government's Exhibit 6? Government's Exhibit 6 is headed, "Certificate of Assessments and Payments." Is that what you used? A. That is correct.

Q. In the work you did you used——

A. The Form 899, Certificate of Assessments and Payments, and made up from the entire period of 1928 to 1948.

Q. With the use of these Certificates of Assessments and Payments, state how you used those certificates in your computation?

(Testimony of Howard H. Whitsett.)

Mr. Parker: Are you referring to cash on hand computation?

Mr. Royston: Yes, sir. Another method of computing cash on hand outside of the Doctor's admission.

Q. Go ahead and explain what the computation was you used [198] in arriving at this cash on hand other than the Doctor's statement of the cash on hand?

A. From 1928 to 1938 there was no record of return on file.

Mr. Parker: It appears to be a most round-about way of getting some evidence which seems to be wholly irrelevant and prejudicial before the jury. He says in answer to the question originally that the Doctor told him and he took the Doctor's estimate, and now this involves a method of getting into evidence matter which would not be relevant if offered directly.

The Court: As far as having said anything thus far he says he is basing it on Exhibits 6 and 13.

Mr. Parker: Yes, but he was beginning to make a statement which I consider prejudicial and which it seems to me quite irrelevant.

The Court: I think what he said so far is what appears on Exhibit 13. I am speaking without the exhibits before me.

Q. (By Mr. Royston): In relation to these exhibits, Exhibits 6 and 13, state just what computation you did and further establishing the cash on

(Testimony of Howard H. Whitsett.)

hand outside of the Doctor's statement of cash on hand?

A. I recomputed from the taxes paid by Dr. Lutfy through these years, the maximum amount of income reported on those returns. In 1934, there was no tax; 1935, \$82.56 tax paid; [199] 1936, no tax; 1937, no tax; 1938, no tax; 1939, \$7.33 tax; 1940, no tax; 1941, \$44.57 tax; 1942, no tax; 1943, is a combination of the '42 and '43, with the forgiveness.

Q. You refer to the military service during that period?

A. That is the forgiveness feature of the '42 return and the '43, when they started withholding taxes. The tax on Dr. Lutfy's return was \$235.38. The tax on Mrs. Lutfy's return was \$235.38. In 1944 the tax on Dr. Lutfy's return was \$837.50. The tax on Mrs. Lutfy's return was \$947.50. In 1945 the tax on Dr. Lutfy's return was \$484, and Mrs. Lutfy was \$384. The maximum net income during those years, taking their personal exemptions, and up to 1943 an earned income credit was allowed. On 1934 income maximum without paying any tax would be \$1,111.11. 1935 on tax paid, \$82.56, the maximum amount of income would be \$34.04, \$4,400. In 1936 there was no tax. The maximum amount of income was still the same, \$1,111.11. In 1937 the Doctor was married and had the additional exemption of his wife and he paid no tax. The maximum amount of net income would be \$1,944.44. In 1938 he paid no tax. The maximum amount of income would be \$2,777.77. In 1939 he paid tax of \$7.33, and at that

(Testimony of Howard H. Whitsett.)

time he had one child. The maximum amount of income would be \$3,452.83. In 1940 he paid no tax. The maximum amount of income was \$2,744.44. In 1941 he had two children and the tax paid was \$44.57. The maximum income would be \$3,793.61. In 1943 he [200] had three children and the maximum amount of income for that year was \$2,350, computed in conjunction with the '43 return. In 1943 we had his return and he reported an income of \$6,220.80. In 1944 we had his return and he reported income of \$9,779.57. In 1945 we had his returns showing his income at \$6,030.98. The total from 1934 to 1945 was \$44,721.10. I then applied an estimated living expense against this income of \$1,000 a year for the years 1934, 1935 and 1936. He was married in 1937 and I allowed \$1,500 living expenses; 1938, \$1,600; 1939 he had one child and it raised it to \$1,800; 1940 to \$1,800; 1941 with three children, \$2,000; 1942 to \$2,400; and for '43 and '44, \$3,600 each year. In 1945 when we had his checks we made an analysis and arrived at personal checks of \$6,842.02. The total living expenses for those years, '34 to '45, \$28,142.02. Taking these estimated living expenses for those years away from the maximum income of \$44,000, left a balance available for investments of \$16,579.08, and the total net worth we have as of 12-31-45 on page 3, total of the first column is \$58,337.20, and that discrepancy between the maximum amount available and the amount of assets on hand we allowed the \$1,000 cash that the

(Testimony of Howard H. Whitsett.)

Doctor estimated he would have on hand as of that date.

Q. All through this method of computation which you just described, you arrived at the \$1,000 figure, which is on page 1, independent of the Doctor's own statement of the estimate? [201] A. Yes.

Mr. Parker: If your Honor, please, at this time we move to strike all of that answer because it is evidenced he dreamed it up out of his imagination. It is obvious. He doesn't state he knew what the Doctor's living expenses were.

The Court: We end up with a result where he says he went along with the Doctor. I mean, there is really no calculation in that. When he is all through, he ends up with the statement that in taking all these into account he went a long way. He went along and allowed the Doctor \$1,000 and \$500 he claims.

Mr. Royston: Yes, sir. That is what we were getting at. This \$1,000 on here, it is to establish a starting point.

The Court: It may stand.

Q. On this net worth statement you stated that the cash on hand for each of the four columns across through there, that that was supplied by the Doctor, is that right? A. That is right.

Q. The next item you have is Checking Accounts. State how you arrived at each one of those figures included under Checking Accounts.

Mr. Parker: We stipulated to those checking ac-

(Testimony of Howard H. Whitsett.)

counts. I assume I got the same information we stipulated to.

Mr. Roylston: I want to show this is not all open and free as Mr. Parker is leading the jury to believe it was. [202]

Q. With reference to items 5 and 6 under Checking Accounts, the Bank of Douglas, in the name of Tiny Lutfy, and the First National Bank, 15th Street, when were those two items disclosed to you by Dr. Lutfy; when did you discover those checking accounts?

A. This trial was first set last October——

Mr. Parker: I don't want to delay this but he said he went to the banks, and as we all know the Internal Revenue can go to any bank at any time and get any information available to nobody else about our bank accounts. These bank accounts are not in any phony names, they are in the name of Lutfy. At least this Tiny Lutfy account is. The Phoenix Sport Shop, you can see is more or less an inactive account, that decreased over the years.

Mr. Roylston: I am going to object to this type of stuff. This is wholly argumentative.

Mr. Parker: But if it is Tiny Lutfy's account, I think it is most unfair and prejudicial to try to weave out of this thing some sinister fabric when the thing is in the name of Lutfy.

Mr. Roylston: As far as these statements of Mr. Parker, I am going to object to them. He keeps going further and further and my patience is about

(Testimony of Howard H. Whitsett.)

worn out and I am going to object to these argumentative discussions before the jury.

The Court: The great difficulty is that you are both [203] ahead of all of us by virtue of having entered into the stipulation. I don't know who Tiny Lutfy is, what connection, if any, she has with the Doctor. I don't know what the thing means on here, and counsel has just asked the witness when it was first disclosed to him—disclosed by whom? I think the objection has a good point.

Mr. Royston: I will rephrase the question.

Q. These items listed under Checking Account, did you discuss these specific accounts with Dr. Lutfy? A. Not all of them.

Q. When did you first discuss any of these checking accounts with Dr. Lutfy?

A. The items 1, 2, 3 and 4, we did discuss with Dr. Lutfy during the examination of the returns.

Q. That was in what period of time?

A. January to April, '51.

Q. During that period of those conferences with Dr. Lutfy, did you ask him if he had any further accounts? A. Yes, sir.

Q. What was his answer to that?

A. He said those were all of his accounts.

Q. Number 5 under Checking Accounts is listed as Bank of Douglas, Tiny Lutfy. During your investigation did you determine who Tiny Lutfy was?

A. Tiny is the nickname of Mrs. Bertha [204] Lutfy.

Q. Tiny Lutfy is Bertha Lutfy?

(Testimony of Howard H. Whitsett.)

A. Bertha Lutfy.

Q. When did you first discuss the bank account listed under item 5, Bank of Douglas, Tiny Lutfy?

A. When the trial was set last October, we subpoenaed the records from the bank, and they brought in that additional account that we had never been upon before.

Q. With reference to item 6 under Checking Accounts, when did you discover that?

A. At the same time. The First National Bank brought in this additional bank account which we had never seen before.

Q. The next item is listed as Savings. Explain just what that is?

A. These are amounts deposited in the Savings Banks as distinguished from the checking accounts.

Q. These are Savings Accounts? A. Yes.

Q. Did you discuss these accounts with Dr. Lutfy in early '51?

A. Number 1 and number 2 only.

Q. When did you discover the account listed as No. 3, Bank of Douglas, Tiny Lutfy?

A. At the same time we found No. 5 and 6 under the checking accounts.

Q. That was in late '53? [205]

A. Late '53.

Q. The next item you have listed on the Net Worth Statement, you give the totals, you have got totals listed. What are those the totals of?

A. Those are the totals of cash on hand and in banks in the years ending '45, '46, '47 and '48.

(Testimony of Howard H. Whitsett.)

Mr. Parker: Before we go to another subject matter, I want to point out to your Honor that this witness testified in this last series of questions that he asked Dr. Lutfy what accounts he—Dr. Lutfy—had, and he said, “these,” pointing out the ones that were Dr. Lutfy’s accounts—“these are all the accounts I have.” Now, he is implying that because Dr. Lutfy answered the question, which he says he asked Dr. Lutfy, and then didn’t go ahead and volunteer the other information about his wife’s account, which there has been no testimony he asked him about, that there was in some manner something wrong about it. It creates an unfavorable impression with this jury and I honestly believe it is an unfair proposition and I move to strike the last series of questions and answers about these bank accounts.

Mr. Royston: If the Court please, I just want the jury to know the facts in this entire matter. I will ask this further question.

Q. When you were investigating the returns that Dr. Lutfy filed, just how were these returns listed; who were the taxpayers [206] on those returns?

A. They were separate community property returns filed in 1946 and 1947 for the Doctor and his wife where they split the income.

Q. At the time you were investigating these tax returns, were you investigating Government’s Exhibit 1, which is Bertha A. Lutfy, as well as Government’s Exhibit 2, which is Louis P. Lutfy?

A. Yes.

Q. Did you inform the Doctor of that?

(Testimony of Howard H. Whitsett.)

A. Yes.

Q. Did you examine Government's Exhibit 3, which is Louis P. Lutfy and Government's Exhibit 4, which is Bertha A. Lutfy? A. Yes.

Q. Did you advise the Doctor of that fact?

A. Yes, sir. With the community property income, we examined the entire amount.

The Court: The motion to strike will be denied. The jury is aware of the questions that were asked and the answers that the witness gave. He was asked when he discovered the bank account. You would have to assume something that he didn't say to get out of that any intention that any misrepresentation had been given.

Q. With reference to Roman Numeral II, Notes and Mortgages Receivable, explain just what is meant by this specific item? [207]

A. In this case, A, B and C, these are mortgages or contracts held by the doctor after he had sold these particular pieces of property, and are the balances owed to him at the end of each year.

Q. These are amounts owed to Dr. Lutfy?

A. Owed to Dr. Lutfy.

Q. What is Item No. D?

A. Item D was, as I understood from the Doctor, a loan made to this man, James E. Porter, and he had some title to this Lot 17, Block 7, West Phoenix Addition, during the time the loan was in existence, as he wasn't the owner of the property. It was more or less collateral. It was in the nature of a personal loan.

(Testimony of Howard H. Whitsett.)

Q. Were you able to determine with reference to these items listed under Notes and Mortgages Receivable, were you able to determine from the Doctor's records or from discussions with the Doctor whether there was interest received on these notes?

A. Yes. The Doctor had records of how much each individual owed and the amount of interest and principal payments of each payment made.

Q. Did you check the income tax returns of the Doctor in an effort to determine whether these interests were reported on the income tax returns?

A. They weren't all reported. [208]

Q. Do you know which were and which were not reported?

A. I couldn't say which ones from here, no. If the total wasn't on the return. It wasn't the same amount as the total on his records.

Q. The totals you have listed there at the bottom of the first page, that is the total of what?

A. That is the total of notes and mortgages receivable at the end of each year.

Q. It is just the total of everything under Roman Numeral II?

A. That is right.

Q. It doesn't include I?

A. It doesn't include I.

Q. On page 2, Roman Numeral III, headed Stocks and Bonds, will you explain what you investigated under that particular heading, and what these mean?

A. These are investments in stocks and bonds

(Testimony of Howard H. Whitsett.)

that Dr. Lutfy owned at the end of these years; investments made by him.

Q. Then you have listed the totals?

A. That is the total of the stocks and bonds only.

Q. With reference to Item 4 headed Automobiles. Explain just why this item, automobiles, is in the net worth statement?

A. An automobile is an asset, and these are the cost values of these assets as of the end of each year. Some, as [209] in A, he traded in and bought and there was quite—several changes throughout that period.

Q. Before we go into that let me ask you this question, if an automobile is a type of asset which is subject to depreciation?

A. If it is used in your trade or business it is subject to depreciation, yes.

Q. Explain what you mean by asset being subject to depreciation?

A. Depreciation is an expense allowance for assets that have a longer life than one year. In the case of an automobile, they will last longer, usually, than one year, and you spread the cost basis of that asset, if it is an allowable expense item, over the life of the asset, instead of taking the full cost in one year and having no expense in the next year. It is apportioned over that life of the asset, whether it is an automobile or rented property buildings, and so forth.

(Testimony of Howard H. Whitsett.)

Q. You stated that to be subject to depreciation an asset must be a business asset, is that correct?

A. Yes. It must be used in your business in the earning of your income.

Q. On these items listed under Automobiles, did you examine the Doctor's returns in reference to the automobiles?

A. Yes, I did.

Q. Did you find the automobiles listed under depreciation? [210]

A. Yes, I did.

Q. How did the Doctor depreciate the automobiles in the return?

A. He depreciated them as being used entirely in his business over a period of five years.

Q. He depreciated them as one hundred per cent business use?

A. Yes.

Q. Would expenses of operating an automobile, if used in business, be deductible?

A. Yes. The business portion would be deductible.

Q. Any expenses used in business?

A. Yes.

Q. Did the Doctor take the automobile expenses as a business deduction?

A. Yes, he did.

Q. Were you able to determine what percentage of the expenses he listed as business expenses?

A. He deducted them all.

Q. Did you make any adjustment on the claimed depreciation as far as your computation is concerned?

A. Yes. In the years when he had one automo-

(Testimony of Howard H. Whitsett.)

Q. I adjusted it to 80% business and 20% personal.

Q. To 80% business and 20% personal use?

A. That is right. [211]

Q. These are the years when he had one automobile? A. Yes.

Q. The totals under this item of Automobiles, that applies only to the different items listed under automobiles, is that correct?

A. That is the total of the automobiles only.

Q. The next item, Roman Numeral IV, is headed Medical Equipment. Will you explain how you arrived at these different items listed here?

A. The medical equipment here as of December 31, 1945, that figures is \$4,110.34, was taken from the Doctor's inventory of his medical equipment, less the assets that had been sold during the year for previous years, excuse me, and this was the balance that depreciation would be allowed upon and was as of December 31, '45. In 1946 he purchased an X-ray machine, since he sold the other X-ray machine, I believe, in 1945, and that is the cost plus the freight.

Q. This \$3,734.34 is the cost plus freight?

A. That is right.

Q. The next item, the File Cabinets, how do you arrive at that figure?

A. In going through his checks, we found checks for equipment, and this particular one was for file cabinets in the amount of \$249.60, that he purchased in '46.

(Testimony of Howard H. Whitsett.)

Q. The items E and F listed as Equipment and Furniture; [212] how did you arrive at those figures used in those columns?

A. Those are totals of checks made during those years and identified by Dr. Lutfy as being items of a capital nature that he had in his office as equipment or furniture.

Q. Your totals for the year ending in 1946 show that the Doctor had medical equipment of \$8,294.28, is that correct? A. That is right.

Q. What did the Doctor list on his return for depreciation purposes as being the value of his medical equipment for that year?

A. Medical equipment is listed as 13,000, and the X-ray machine was set up separately as a cost of 7,000, total 20,000.

Q. That X-ray machine, that is the one listed as \$3,734.34 as being the price plus freight?

A. That is right.

Q. You state that was set up in the return at a cost of 7,000 for depreciation purposes?

A. That is right.

Q. With respect to the year ending 12-31-47, you have the medical equipment listed as \$9,259.50. Refer to the Doctor's return for the year 1947 and state what amount the Doctor used as medical equipment for the purpose of depreciation.

A. He claimed that the cost basis was 13,000 for medical equipment and 7,000 for the X-ray. [213]

Q. The 7,000 was in addition to the 13,000?

A. That is right. The total would be 20,000.

(Testimony of Howard H. Whitsett.)

Q. With reference to the year ending 1948, you have that the total medical equipment is \$10,028.30. Referring to the '48 return state what the Doctor listed as medical equipment for depreciation purposes.

A. He claimed the same amount as in '46 and '47, 13,000 cost for medical equipment and 7,000 cost on the X-ray.

Q. Will you explain for the purposes of clarification, if the taxpayer lists for the purposes of depreciation a cost in excess of the actual cost, does that work for the benefit or detriment of the taxpayer?

A. That increases his depreciation expense allowed or claimed for that year and reduces the taxable income.

Q. If the depreciation is increased the taxable income is decreased, is that correct?

A. Yes. Depreciation is an expense and taken away from the income.

Q. It results in a lower tax being paid?

A. That is correct.

Q. Did we cover 1948 of \$20,000 depreciation?

A. Yes.

Q. The next item that you have listed is Real Estate. How did you arrive at these figures you have listed in real estate? [214]

A. From the public records.

Q. As far as item A is concerned, what was that particular piece of real estate?

(Testimony of Howard H. Whitsett.)

A. That item A is 1305 East Granada, was the Doctor's residence up until June, '48.

Q. You have furnishings listed there; what is the purpose of furnishings being listed?

A. His accountants have informed us that he valued the furnishings that was sold with the house in '48 at \$2,000.

Mr. Parker: I understand that—if I understood it—it is purely hearsay that he said somebody else's accountant informed him Dr. Lutfy valued the thing at \$2,000. I move to strike it if I heard it right. It would be hearsay.

The Court: I believe the statement was that the accountants told him he sold it for that.

A. He sold the house and valued the furnishings at \$2,000 that were sold with the house.

The Court: Who told you this?

A. We received word through his accountants.

Mr. Parker: It is heresay now.

The Court: It may be stricken.

Q. Was it Mr. Moser that told you that?

A. Mr. Moser didn't tell me that.

Q. Where did you get this figure of 2,000?

A. From the Penal Division's figures in Los Angeles when they had a conference on this [215] case.

Q. Conference with whom?

A. Mr. Cass, the Government Representative in Los Angeles in the Penal Division.

Q. Was this 2,000 figure received from Dr. Lutfy or one of his accountants?

Mr. Parker: The questions are leading and sug-

(Testimony of Howard H. Whitsett.)

gestive. Counsel isn't getting any closer to the original thing. The witness hasn't said anything at all to deprive us of the hearsay quality.

The Court: Objection sustained.

Mr. Parker: In the moment of pause I have had an opportunity to discuss this matter with Mr. Moser and I am advised we have no objection to including this item. And we will stipulate that the furniture in that particular property which was sold furnished was of the estimated value of \$2,000.

Mr. Roylston: Either way is all right with us. It can go in or out, it doesn't make any difference to us.

The Court: If counsel is willing to stipulate.

Mr. Roylston: Do you want it in?

Mr. Parker: Yes.

Mr. Roylston: All right, let us put it in.

Mr. Parker: By stipulation?

Mr. Roylston: Yes, sir.

Q. (By Mr. Roylston): Under item B you have listed Paving and Remodeling. What are those items in there for? [216]

A. Those are expenses we found in going over the checks. For paving there was an assessment in 1946 for \$487.95 on that property.

Q. Was this rental property?

A. Yes. The 1123 North Seventh Street is a rental property.

Q. On rental property is the taxpayer allowed to depreciate improvements to rental property?

A. To the building, not to the land, and paving

(Testimony of Howard H. Whitsett.)

is an added item to the cost of the land and it is not depreciable.

Mr. Parker: Is the witness stating that paving does not depreciate?

Mr. Royston: The pavement is not a depreciable item, I believe was his statement. It is an assessment to the real property rather than any improvement to the building.

The Court: The way he is stating it, if I understand, it is treated like land for the purpose of depreciation.

Mr. Parker: If it is understood he uses that theory for his purposes it is all right with me. Whatever theory he uses.

Q. (By Mr. Royston): Under item D you also have land improvements listed there, is that correct?

A. Yes.

Q. \$310?

A. That was for landscaping, planting trees, bushes. That [217] also adds to the cost of the land. It is not by Internal Revenue laws allowed for depreciation purposes.

Q. You have a building under item D listed at \$21,429.07, and I believe that is stipulated to.

Mr. Parker: I don't know. I haven't added up the data. Not specifically in that amount. We may have stipulated to other items added together would make that.

Mr. Royston: The total is \$21,429.07, is that correct? A. That is correct.

Q. Referring to the Doctor's—

(Testimony of Howard H. Whitsett.)

Mr. Parker: Just a minute. On that, we stipulated to the amount he paid to the contractor and the architect, and I think that, without the land, would amount to the sum you have, but we haven't stipulated on any other.

Mr. Royston: From the items which you were able to determine went into the actual cost of the building amount to \$21,429.07?

A. That is right.

Q. Will you refer to the Doctor's return for that period and state what building was listed on the returns for depreciation purposes?

A. This building was completed in '46, and on his '46 return this is his office building that I questioned him about on my first visit where he claimed a cost of \$30,000, and the \$21,000 was all we were able to find. [218]

Q. And the Doctor depreciated it at \$30,000?

A. That is right.

Q. Item E you have listed under the year 1945; what was that transaction?

A. That was the ownership of a one-third interest in a corner lot and buildings at the corner of Central and Moreland. That was his equity or one-third interest in that building which was sold in 1946.

Q. Item F is listed under 1945, and what is that?

A. That is a vacant lot at Fifth Avenue and McDowell that he purchased in 1945 and sold in 1945.

Q. Item G, is that rental property, item G?

A. Yes. That is the lot next door to item D.

(Testimony of Howard H. Whitsett.)

Item D is Lot 9, Block 14, Kenilworth, and G is Lot 10, Block 14, Kenilworth.

Q. \$6,014.24 was the price of the lot with a building on it?

A. There was a building on the rear of that lot.

Q. Under that same item there is, Remodeling Old House for the Year 1947, \$1,861.26. Is that the cost of remodeling that house?

A. That is the item we found in going over the checks that could be identified, or that Dr. Lutfy identified, as being used in the remodeling of this house which he made over into an office and rented as a doctor's office. [219]

Q. Now referring to the Doctor's return for the year of '47, state how that item of remodeling the old house was listed for depreciation purposes and in what amount it was listed?

A. The remodeling wasn't listed on the '47 return.

Q. '48 return for the year '47 is what I meant. No, this is the year '47, listed on '48?

A. It was remodeled during the year 1947.

Q. It is not listed on the '47 return?

A. No.

Q. Is it listed on the '48 return?

A. Yes, sir. There is an item—remodeling, listed 1-1-48 of \$5,000. I asked the Doctor about that item and he said it was the combination cost of the remodeling of this house on the back of the lot at Third Avenue and McDowell and the remodeling of the building on 1123 North Seventh.

(Testimony of Howard H. Whitsett.)

Q. Item B? A. Item B.

Q. So, in other words, the figures you arrived at, \$181.54 and \$1,861.26, the Doctor had lumped those two together on the return at \$5,000, is that correct?

A. That is right. He made one remodeling item of \$5,000.

Q. You have under item G a building listed under 1948 at \$15,356.42. Is that a different building from this house that was remodeled? [220]

A. Yes. That is a wing he put on the building under item D.

Q. That is the office building?

A. That is his office building. He added a wing to that building in '48 and rented it out as a doctor's office.

Q. From the Doctor's records, you determined that the cost of that building was \$15,356.42?

A. That is right.

Q. Will you check on the return for the year '48 and see the amount the Doctor listed as the cost of that building for the purposes of depreciation?

A. Under the original office building he has an addition to the office acquired July 1, '48, cost of \$20,000.

Q. It was listed as 20,000 for depreciation?

A. That is right.

Q. Item I was a vacant lot at the time it was acquired in 1946, is that correct?

A. Items H and I are both vacant lots.

(Testimony of Howard H. Whitsett.)

Q. Item H is a vacant lot valued at \$6,414.43?

A. Yes.

Q. Acquired in '47? A. Yes.

Q. Still held in '48? A. Yes.

Q. Item I is at a cost of \$6,670.71, is that [221] correct?

A. Yes, sir. That is where he paid for his home.

Q. Item J, Seventh Avenue and Maryland. What is this particular piece of property?

A. That is the triplex, the cost of the triplex at Seventh Avenue and Maryland.

Q. That is the piece of property Mrs. Way testified to yesterday? A. Yes.

Q. They call it the triplex? A. Yes.

Q. Now, you have furnishings listed there at \$3,423.50. This is where the Doctor lived at this address during this period of time?

A. Yes, after he sold 1305 East Granada, yes, sir.

Q. Is a personal residence subject to depreciation? Can a taxpayer claim a personal residence for the purposes of depreciation? A. No, sir.

Q. Will you check the Doctor's '48 return and see if he claimed a residence for depreciation purposes?

A. He has down here a concrete block duplex, which he explained was actually the triplex, at \$20,000, and took depreciation on all of it, and the furniture he has listed as \$3,357.50. He acquired the furniture by trading his Buick Convertible, and that is being, has been depreciated [222] one hundred per cent.

(Testimony of Howard H. Whitsett.)

Q. He depreciated the furnishings?

A. He depreciated the house and the land and the furniture.

Q. The house and land and furniture, all of the residence?

A. Yes.

Q. You have a list of the totals across there. That first list of totals, that is the total of the real estate, is that correct?

A. That is the real estate only.

Q. So, at the end of the year 1945 the real estate was \$36,602.14, and it included up until the end of 1948, \$93,920.59, is that correct?

A. That is right.

Q. You have next the total assets?

A. That is the total of pages 1 and 2.

Q. That is the total of all items we have discussed up to now?

A. All the items.

Q. You have those totals, \$61,662.95, at the end of 1945 and that increases up to \$131,129.43 at the end of '48?

A. That is correct.

Q. That completes the assets in your net worth statement?

A. That is right.

Q. What is the purpose of page 3 in this computation?

A. The totals on the previous page are reduced by the [223] amounts of money owed against the properties or any personal loans that might be outstanding at the end of any one particular year.

Q. In other words, before you arrived at the net worth you subtracted the taxpayer's liabilities from his assets?

A. That is correct.

(Testimony of Howard H. Whitsett.)

Q. After taking his liabilities from his assets it leaves the net worth? A. That is correct.

Q. The first item, Roman Numeral VII, Mortgages Payable, what is that?

A. Those three items are loans or mortgages against these properties; Frances Rose Cordell is the mortgage against this property. Under J, Seventh Avenue and Maryland, triplex, at the end of '48 he owed \$10,000. Under B, First Federal Savings and Loan Association, is \$10,615.85, that he borrowed from the First Federal Savings and Loan when he was building his office, the first building, and under C, Northwestern Mutual Life Insurance Company, is the amount of the loan that he borrowed in 1948, and he owed \$14,800 against that as of December 31, 1948.

Q. The next item you have listed is Roman Numeral VII, Outstanding Checks. What is meant by that?

A. These are items of checks that Dr. Lutfy had written perhaps the last two or three days of the year but had not [224] cleared the bank, and they adjust the bank account to the actual amount of money. According to the Doctor's own record, he had written these checks that are listed there in total but they had not cleared the bank, and it is in effect a liability.

Q. So, in other words, you list the bank deposits as assets, but if there are any outstanding checks in any of these periods, you deduct those as liabilities?

A. Those bank balances at the end of the year

(Testimony of Howard H. Whitsett.)

are listed as assets and these are owed against those assets so deducted as liabilities.

Q. The next item you have listed as Depreciation Reserve (See Schedule). Explain what is meant by depreciation reserve?

A. Each year that you are allowed your depreciation expense, that expense is added and the offsetting and accounting debit or credit, in this case is the credit for the expense, is the reserve, and that carries from one year to the next as long as one asset is still owned upon which depreciation has been allowed. As soon as the asset has been sold, the depreciation reserve is debited for the amount of depreciation expense over the years of life of that asset. That has been allowed and is a part of that reserve. It is then taken out and you only have the amounts accumulated that have been allowed in prior years. This reserve figure represents the [225] amount of depreciation expense allowed during that year in '45, \$3,311.65. That includes the year '45 and only prior depreciation allowed on the assets that are on the statement listed under the year 1945, and the same in the other years.

Q. This depreciation reserve is listed as a liability and that is deducted from the taxpayer's assets? A. That is correct.

Q. The next line is the total liabilities. That is the total of everything on this page down to that line, is that correct? A. That is right.

Q. The next line you list the net worth at the close of year?

(Testimony of Howard H. Whitsett.)

A. That is the figure that you arrive at after taking the total liabilities column line away from the figure on page 2 of total assets at the bottom of the page.

Q. That is the difference between his assets and liabilities?

A. That represents the difference between his assets and his liabilities.

Q. Then the next line is net worth beginning of year. That is at the beginning of that particular year for the purposes of subtracting it from the amount at the end of the year?

A. That is where you arrive at the increased net worth for that particular year. You take the ending net worth and [226] subtract the beginning net worth and the difference is the amount that the net worth has increased during that twelve-month period.

Q. For the year 1946, at the end of the year of 1946, Dr. Lutfy's net worth was \$65,588.43, is that correct? A. That is right.

Q. During the year 1946 his net worth increased \$7,251.23, is that right? A. That is right.

Q. For the year '47 Dr. Lutfy's net worth was \$74,265.11 at the end of the year, is that right?

A. That is right.

Q. And his net worth had increased during that year \$8,676.68, is that correct?

A. That is right.

Q. For the year '48 at the end of the year Dr.

(Testimony of Howard H. Whitsett.)

Lutfy's net worth was \$97,294.73, and during that year his net worth had increased \$23,029.62?

A. Yes.

Q. I am going to show you this.

Mr. Parker: There is a motion which I have in mind with respect to some of the testimony just given; however, I will not interrupt now but wait for the recess to make it. It has to do with the bill of particulars and various amendments thereto and there is a certain departure of the evidence, [227] it seems to me, from that.

The Court: We will recess very shortly because I have another matter at 4:00 o'clock.

Q. I am going to show you this document marked as Government's Exhibit 34 and ask you if you prepared the figures on that document?

A. Yes, I did.

Q. How did you arrive at the computations on that document? What was used in arriving at those particular figures?

A. There were capital gains.

Q. What I am getting at is, did you use your net worth statement, Government's Exhibit 33, in the preparation of this document?

A. Yes.

Q. Government's Exhibit 34 for identification?

A. That is right.

Q. You prepared this yourself, I believe you stated?

A. Yes, sir.

Mr. Royston: I will offer 34 for identification into evidence.

Mr. Parker: If the exhibit is for the purpose of

(Testimony of Howard H. Whitsett.)

proving he prepared it, all right, but there is no foundation laid for it here as far as establishing any of the facts other than the capital gains as shown by his computation for the various years. That is the only thing. We don't agree [228] with his method of figuring income tax at all, and I don't think the Court will when I point out the obvious and manifest errors in it.

The Court: I will excuse the jury at this time and we can take up your motion and also this other matter. I have another case at 4:00 o'clock so we will have to adjourn for the day at this time. I will excuse you now until 10:00 o'clock tomorrow morning.

(Whereupon the jury retired from the Courtroom.)

Mr. Parker: I move to strike all of the testimony about improper depreciation because I think it should have been objected to and excluded at the time, except I overlooked the connection at that time. Furthermore, I am going to register for the record at this time a motion for a continuance in this case in order that we may have time to prepare because I avow to the Court that we have relied on these figures the Government gave us on net worth for the whole period, and we have done an enormous amount of work predicated very largely on that and we are now being confronted with an entirely different set of figures. For that reason I move that the defendant be allowed a reasonable

(Testimony of Howard H. Whitsett.)

recess of this trial for the purpose of meeting the new set of figures with which we are now confronted with respect to net worth.

The Court: I will recess this case until [229] 9:30.

September 10, 1954, 9:30 A.M.

The Court: The record may show that the jury is absent. Is the defendant here, Mr. Parker.

Mr. Parker: I advised him he wouldn't be needed at this argument. He is voluntarily absent. The record may show that.

The Court: I have given consideration to the motion to strike the evidence as to depreciation, and I am going to reserve ruling on it at this time. In other words, it won't be granted at this time. I will reserve ruling also on the motion for a continuance; however, I do want the Government to give me a statement as to each year as to the difference in unreported income or claimed unreported income; the difference that is accounted for by your recasting a depreciation plan, by your recasting the capital gains or losses, and by your recasting any deductions that were claimed on the return for which you now have disallowed. What I am getting at, any claim that was made on these returns such as for depreciation which the Government now contends was excessive and is recasting and thereby accounting for claimed unreported income on any capital gains that were on the return or in the return, and you now have applied a basis other than that

(Testimony of Howard H. Whitsett.)

claimed by the taxpayer and that accounts in part for some of the unreported income. [230]

Mr. Parker: I wish to modify the motion I made yesterday for a continuance that was made in haste by saying that I believe there will be no such continuance as I indicated yesterday would be necessary, but that some interval of time, a short interval of time would be necessary to complete our accounting and to revamp it.

The Court: I have ruled on it and it will stand. I think we have left the matter of Exhibit 34 which was offered by the Government, the fourth page.

Mr. Parker: I think I have already stated an objection to that.

The Court: At this particular time on this I propose to admit 34. The only thing I can say to you, Mr. Parker, is that if after the witness explains it, as I assume he will have to in order that it can be understood, and after you have cross-examined him, if there should be a basis for a motion to strike it, we will do that. I don't know any other way to handle it.

Mr. Parker: Very well. There is one other matter I should like to take up before the jury comes into the courtroom. As a precautionary matter, I would like to ask the Court before adjourning over the week end to again remind the members of the jury that they are not to read any newspaper accounts of the case.

The Court: I will try to bear that in mind. If I [231] should forget, will you and the Government

(Testimony of Howard H. Whitsett.)

Counsel come to the bench and remind me of it so that I can do that? Let the record show that the defendant is now present.

(Whereupon the jury returned to open Court.)

The Court: Exhibit 34 for identification will be admitted in evidence.

HOWARD H. WHITSETT

previously called and sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Roylston:

A. These are copies of Exhibit 34 which was just admitted. Mr. Whitsett, you were testifying yesterday afternoon concerning this computation which is now marked Government's Exhibit 34. Will you state the difference between this Exhibit 34 and Government's Exhibit 33, which was the net worth statement, and how this applies to the net worth statement?

A. The net worth statement is in theory the balance sheet of the taxpayer, and this takes that difference between the ending and beginning balance and adjusts it to arrive at the taxable net income.

Q. In other words, you take the results of the net worth statement and compute the unreported net income on this [232] particular sheet?

(Testimony of Howard H. Whitsett.)

A. Yes.

Q. Testifying from Government's Exhibit 34, the first matter is headed Expenditures Not Reflected in Above Increases. Will you explain what that means?

A. This includes any adjustments for capital gains and capital losses or ordinary losses, and you add any living expenses either by cash or by check that are not reflected and do not include any of the assets.

Q. Under item 10 you have Adjustment for Capital Gains and Losses, and A states "add loss on sale of auto," and you have \$684.42 entered under the column for the year ending 12-31-47. What does that particular item mean?

A. In this particular case, an automobile was sold at a loss. You add back in the losses at the full amount and if you will look under 13B you then take out the amount of the allowable loss. Sometimes all of it. In this case it was part of the loss for business and part was for personal. The business portion of the loss is allowable and the income is reduced by that portion. The balance was personal loss and is not allowed as a deduction.

Q. In other words, you testified yesterday that the automobiles were divided, if there was one automobile only it was divided 80% business and 20% personal use, is that correct? [233]

A. That is right.

Q. Then that loss on the sale of an automobile,

(Testimony of Howard H. Whitsett.)

the percentage of business use is allowable as a deduction to the taxpayer, is that correct?

A. That is correct.

Q. The percentage which is personal loss is not allowable, is that correct? A. That is correct.

Q. Under item B under No. 10, you have subtracted capital gains 100%, then you have an item listed in three different columns, you have three different items listed in three different columns, what does that particular item refer to?

A. That represents the full amount of any gain made on any sale of a capital asset and is all added back, I mean all taken out of the income entirely in this, under 10 and under 13A, the portion that is taxable only in capital gains. If the asset is held over six months it is only taxable to 50%, and in 13A you add back the taxable portion of that which in effect eliminates the nontaxable portion from the income and the taxpayer is not taxed with that.

Q. You have subtracted \$6,918.55 under 10B, and then you add that same amount back under 13A; is that the item which the Government contends that particular piece of property was held for less than six months?

A. That represents two pieces of property were held less [234] than six months.

Q. If a particular asset was held less than six months, then in your computation you tax it?

A. One hundred per cent.

Q. Now, the next item you have listed as Living

(Testimony of Howard H. Whitsett.)

Expenses. Just where did you obtain those items and what do they refer to?

A. These living expenses, "A—paid by check," is an item we found in going over the checks for personal living expenses.

Q. These are cancelled checks of Dr. Lutfy?

A. Cancelled checks, yes. That is the total of those for each year.

Q. Then the living expenses, the cash estimated, how did you arrive at those figures?

A. Those figures, we asked the Doctor how much he estimated his cash living expenses would be because we found practically no checks for groceries or personal items of that type in his checks, and he in computing it said that during the year before when he was in the service he received the family allotment of, I believe, \$50.00 for the wife and \$35 or 40 for the first child and 20 for each additional child, about \$125 a month; and that his wife, when he returned from the service, was very proud of the fact she was able to live on that amount of money while he was in the service, and hadn't had to use their capital, so he estimated that was the [235] approximate amount of living expenses for that year, and he thought perhaps in '47 and '48 it would amount to a little bit more.

Q. So those items were given to you by Dr. Lutfy?

A. They were.

Q. The next item under Living Expenses is Lincoln Continental Convertible, and under the year ending '47 you have listed \$5,420. Will you explain

(Testimony of Howard H. Whitsett.)

why this particular automobile is listed under the living expenses?

A. That automobile was an automobile purchased by the Doctor in the fall of 1947 and it was stolen, and the Doctor, of course, had insurance and sued to get recovery from the insurance company; so there was no loss to be allowed on that until there was a final settlement by the insurance company. That is an income tax regulation that if you have a claim you have no loss until the claim has been settled.

Mr. Parker: I move to strike that statement. The witness is not giving us a lecture on the law of income tax. I have no objection if he states what he did in connection with this, but we disagree with him most stringently on the point.

The Court: When the witness refers to the law, we will instruct the jury that the witness means his version of the law as a tax expert and his understanding of the regulations. That is what we will understand, Mr. Parker, just as [236] when your expert takes the stand. We will have the same understanding.

Q. Was this item, \$5,420, was that stipulated to as a cash expenditure?

A. Yes, sir. It was stipulated by both parties.

Q. The next item you have is Number XII, Depreciation Allowable Not Reflected in Reserve Increase. What does that mean?

A. Your reserve increase only takes into consideration the depreciation allowed on the assets

(Testimony of Howard H. Whitsett.)

that are still in possession of the individual. This amount in Number XII represents the depreciation allowable in that particular year on an asset that has been sold. It is allowable expense for that year; however, the asset is not in the balance sheet any more and the reserve does not reflect that deduction, so it is an additional deduction allowed for that specific year.

Q. So this is an additional deduction in favor of the taxpayer, is that correct?

A. That is correct.

Q. Then the next line across is the total for each of these columns down to that point?

A. That is right.

Q. The next item you have is Capital Gains and Losses. Will you explain what A and B each mean under that and how they are applicable here? [237]

A. In A you add back the taxable portion of the capital gain that was stricken in item 10B, which was \$6,918.55 in '46, \$2,363.16 in '47. You will notice in '48 the asset was held over six months and the amount added back in there is just half of the amount in 10B of \$1,883.65.

Q. So, if the asset was held longer than a six-months period, then in your computation of the profit from the sale, you computed it on a 50% basis, is that correct?

A. That is correct.

Q. The next column is Corrected Adjusted Gross Income. What does that mean?

A. That is the income before you take out your

(Testimony of Howard H. Whitsett.)

allowable personal deductions, and if you are familiar with income tax returns, the last line on the first page is the same, is where we get to the return.

Q. This is the adjusted income before allowable deductions, is that correct? A. Yes.

Q. Item XIV you have listed Less Allowable Deductions. This item 14 is the one you were going to subtract from item 13, is that correct?

A. Yes.

Q. Under allowable deductions you have about four different items listed there. Explain what each of those is and how you arrive at those [238] figures?

A. The contributions in both years are those claimed on the return of Dr. Lutfy. The interest in '46 is the amount claimed by Dr. Lutfy. The taxes are the same as the amounts on the return.

Q. Those correspond exactly to the returns, is that correct?

A. Yes. The miscellaneous (to allow standard deduction)—on the return of Dr. Lutfy for '47, he had claimed the Lincoln Continental Convertible loss of theft, which I disallowed in that particular year. That brought his allowable deductions below the thousand dollar standard deduction, and this figure is merely a balancing figure to bring it back up and allow the full amount of the standard deduction for that year.

Q. So, in the taxable year of '47 and the year '48, you allowed Dr. Lutfy the standard deduction of \$1,000 on each year, is that correct?

(Testimony of Howard H. Whitsett.)

A. In the year '48 the standard deduction was claimed on the return.

Q. The standard deduction was claimed on the return in that year? A. Yes.

Q. What does this next item mean, Net Income Corrected?

A. That is the corrected gross income less the personal deductions or the standard deductions, whichever is applicable, [239] and is the amount of income upon which the tax is computed.

Q. In other words, that is the difference between this column "corrected adjusted gross income" less any allowable deductions, is that correct?

Q. And the net amount according to your computation was \$12,231.30 in the year '46, is that correct? A. That is right.

Q. And the net income in '47 was \$21,773.47, is that correct? A. That is right.

Q. And the net income in the year '48 was \$28,105.15, is that correct? A. Yes.

Q. And then this next column across here, "net income reported." Does that refer to the returns that were filed? A. That is right.

Q. That is the net income reported on those returns, is that correct? A. That is right.

Q. Then you found the difference which was unreported and you found the difference in the year '47 to be \$7,611.48? A. 1946.

Q. For the year '46? A. That is right.

Q. For the year '47 you found the difference in unreported [240] income to be \$13,719.10?

(Testimony of Howard H. Whitsett.)

A. \$419.

Q. \$13,419.10? A. That is right.

Q. You found the unreported income for the year '48 to be \$9,651.53? A. That is right.

Q. And those items listed across the bottom, that is the amount that the Government now claims that Dr. Lutfy failed to report, the additional amount he failed to report on his return, is that correct?

A. That is correct.

Q. Now, Mr. Whitsett, on the basis of this unreported net income, did you recompute what the Doctor's tax should have been on the basis which we state was the unreported income?

A. Yes, I did.

Q. Is that computation here?

A. The computation is there, yes.

Q. Are these the computations?

A. The other on the white paper.

Q. Are those the computations?

A. That is right.

Q. Can this be marked as one exhibit?

The Clerk: Government's 35 for [241] identification.

Q. These are the computations which you made with respect to the income which you have just testified to from Government's 34, is that correct?

A. That is correct.

Q. There is a part of this exhibit which shouldn't be on here before it is offered, but I will go ahead and offer it and cut that off. Rather than offer this

(Testimony of Howard H. Whitsett.)

exhibit which has some computations on it which shouldn't be on it, let me withdraw this at this time and ask a different question. Mr. Whitsett, did you compute the tax according to the unreported income which the Government has listed on Exhibit 34? A. Yes, I did.

Q. Do you have the totals of those taxes, the total of the tax for each year set down?

A. No, I don't.

Q. Is that on here?

A. Not the totals for three years.

Q. Do you have the tax listed for each year?

A. On that is the only place.

Q. You compute it and set those totals down on these? A. I computed that, yes.

Q. Without offering this exhibit, if I could ask this witness to state what the tax was each year according to the computation taken from 34, that will save having to put this in. I will ask you to testify according to your computations [242] based on Government's Exhibits 33 and 34 what you computed Dr. Lutfy's tax to be for each, '46 through '48?

A. The correct tax liability for Louis P. Lutfy for 1946 is \$1,073.57.

Q. Just tell us as to the total of the tax which was due for each of those years. Was that the total tax? A. That is the total tax due.

Q. For 1946? A. For 1946 for Dr. Lutfy.

Q. How much was it? A. \$1,073.57.

Q. What was the amount due from Bertha Lutfy

(Testimony of Howard H. Whitsett.)

for 1946? A. \$950.07.

Q. That made a total of \$2,023.64?

A. I didn't add it.

Q. For the year 1947 what did you compute that tax to be?

A. Dr. Louis P. Lutfy for the year 1947, the correct tax liability is \$2,471.42.

Q. What was the amount for Bertha Lutfy for that year?

A. Mrs. Bertha Lutfy, the correct tax liability was \$2,309.92.

Q. For the year '48, what was the tax liability for Dr. Lutfy?

A. There was a joint return in '48.

Q. This is both Dr. Lutfy and Bertha Lutfy, is that correct? [243] A. That is correct.

Q. What is the amount of that tax?

A. The correct income tax liability is \$6,362.20.

Q. \$6,362.20? A. Yes.

Q. Referring to the returns for the year 1946, you stated that according to your computation made from Government's Exhibits 33 and 34, you computed Dr. Lutfy's tax to be in the amount of \$1,073.57, is that correct? A. Yes.

Q. What was the amount of tax that was paid according to the return?

A. The tax reported on the return, \$248.88.

Q. You stated that the tax according to your computation for Bertha Lutfy should have been \$950.07; what was the amount reported on the return?

(Testimony of Howard H. Whitsett.)

A. The amount of tax due reported on the return, \$153.88.

Q. For the year 1947 you stated that according to your computation the tax Dr. Lutfy should have paid was \$2,471.42; what was the amount of tax Dr. Lutfy reported on the return for that year?

A. The amount of tax due reported on the return, \$626.03.

Q. According to your computation for the year '47 the tax which Bertha Lutfy stated was \$2,309.92, what was the amount reported on the return? [244]

A. The amount reported due on the return, \$521.53.

Q. For the year '48 computed on the basis of a joint return you stated that the tax which should have been paid was \$6,362.20; what was the amount reported on the return?

A. The amount reported due on the return was \$3,265.36.

Q. Leaving your computations for a few minutes, I want to get into some other matters here. You stated yesterday that you went over Dr. Lutfy's books and records and over his returns on several occasions at his office?

A. That is correct.

Q. You stated that you found some camera equipment. Will you testify just how that camera equipment was shown in his books and records and how it was shown on his returns, if it was?

A. There was camera equipment shown on the returns in the depreciation schedule, if, I believe, \$2,000, and depreciated.

(Testimony of Howard H. Whitsett.)

Q. Were you furnished a depreciation schedule by Dr. Lutfy or is that according to the return?

A. That is according to the return.

Mr. Parker: Are you referring to a particular year? I think these questions and answers should be more specific.

Q. Let me direct your attention—did you find any of this camera equipment on the returns? Can you locate them on there now? [245]

A. On the '48 return there is \$2,000 listed as clinical photo equipment.

Q. On the '48 return?

A. On the '48 return.

Q. How is it listed, photo equipment—and what particular place is it shown on the return?

A. In the depreciation schedule.

Q. The photo equipment is shown in the depreciation schedule? A. Yes.

Mr. Parker: Clinical photo equipment if you want to be accurate. When reading these off, it would be advised, it seems to me, to be accurate. It is listed as clinical photo equipment. It is one thing to say photo equipment and another thing to say what is on the return, photo clinical equipment.

The Court: I believe the witness said photo clinical equipment and then counsel abbreviated it to photo equipment.

Q. Did you examine the Doctor's equipment there at his office in regard to this photo equipment?

A. I saw no photo equipment in his office, no.

(Testimony of Howard H. Whitsett.)

Q. Did you discuss the matter of clinical photo equipment with Dr. Lutfy? A. Yes, I did.

Q. Relate to the best of your recollection what that [246] discussion was?

Mr. Parker: May there be a foundation laid?

Q. Do you recall just where you had this conversation concerning this photo equipment?

A. The first time was in the Doctor's office, and we talked about it several times at the various conferences either in the Doctor's office or Internal Revenue Office.

Q. Do you recall the approximate dates of these conversations?

A. Probably the first one would have been at the original conference in April of 1949.

Q. Do you recall when the other conferences were? A. Not a specific date.

Q. Do you recall approximate dates?

A. Probably in the February or March conferences in '51.

Q. Do you have any notation concerning those particular conferences? A. Yes, sir.

Q. From which you can refresh your recollection. When were these notes made?

A. Notes were taken and I made memorandums of interview immediately after we had the interview with Dr. Lutfy.

Q. They were made after each interview?

A. Yes.

Q. Can you refresh your recollection from your notes and [247] state on which occasions, to the

(Testimony of Howard H. Whitsett.)

best of your recollection, you discussed photo equipment or clinical photo equipment?

A. One conference would have been on March 7th.

Q. 1951? A. '51, yes.

Q. One was the first time you contacted Dr. Lutfy, is that correct?

A. No; that is in '51—yes, the first time.

Q. The first time you contacted Dr. Lutfy?

A. Yes.

Q. In what year was that?

A. That was '49.

Q. Do you recall who was present at those conversations?

A. The first one was just Dr. Lutfy and myself.

Q. Do you recall who was present at the other conversations?

A. Mr. Tucker, Dr. Lutfy and myself.

Q. Relate the best you can remember what the conversations were concerning this camera equipment.

A. I questioned the Doctor on this depreciation claimed on cameras and he gave me the information.

Mr. Parker: May I interrupt? This is not a statement of conversation. This is a statement of the witness' conclusions. He doesn't purport to state the conversation. I wish to move to strike it and he be instructed to relate the [248] conversation if that is what he is asked for.

The Court: Motion denied. In giving the con-

(Testimony of Howard H. Whitsett.)

versation, just tell us as accurately as you can what the Doctor said and what you said.

A. I asked him why the item was listed on his depreciation schedule and he explained that he had a hobby of cameras and he was using those cameras and the camera hobby in taking pictures relating to his medical practice. He stated he would take pictures of skin diseases or various things that he felt would assist him in his medical practice.

Q. You stated that he set this camera equipment up as a business under depreciation for business purposes, is that correct? A. That is right.

Q. What was the amount of this equipment he listed on his 1948 return?

Mr. Parker: That is objected to as having been asked and answered heretofore.

Q. Did you say \$2,000? A. I said \$2,000.

Q. If I might be permitted to return—I forgot what the amount was.

Mr. Parker: I am sure a few other people have. He asked him before and he plainly answered.

The Court: It was asked and answered. [249]

Q. This is the amount here?

A. That is right.

Q. At the time that you were present in the Doctor's office, did you see any other photographic equipment other than the X-ray equipment?

The Court: What do you mean, in '49 or '51?

Q. In '51 during these series of conferences——

(Testimony of Howard H. Whitsett.)

Mr. Parker: Immaterial and irrelevant if he saw any at that time.

Q. Did you see any in '49? A. No.

Mr. Parker: I object as irrelevant. We are concerned with '48.

The Court: The answer in '49 may stand.

Q. You didn't see any of them?

A. Didn't see any in his office, no.

Q. Did Dr. Lutfy show you any records of camera or photographic equipment which were kept in connection with the business?

A. In going over the checks, there were certain checks that were made out to camera supply houses but there was, there may have been one or two invoices, but no complete list of invoices to add up to \$2,000.

Q. I believe you stated that you at one time, you were shown an inventory of the Doctor's medical equipment? [250]

A. That was the inventory from 1941.

Q. That was a prior inventory? A. Yes.

Q. Was this clinical photographic equipment at \$2,000 listed separately from any X-ray equipment?

A. Yes, sir.

Q. Now, in going over these cancelled checks which reflected purchases of photographic equipment, were these particular amounts charged to business expense or how were they charged on the Doctor's records?

A. The checks we show were charged to business expenses.

(Testimony of Howard H. Whitsett.)

Q. You were present when Mrs. Larson, the lady from the camera shop on the Coast, testified there was a camera returned to their company by Dr. Lutfy? A. Yes.

Q. You heard that testimony? A. Yes.

Q. Were you able to find any evidence in the checks or deposit slips of Dr. Lutfy which were in relation to that transaction?

Mr. Parker: That lady testified there was no money involved. As I recall it, there was an exchange of certain equipment. Naturally, he wouldn't find any checks based on her testimony because she said it was an exchange of equipment, various type of photographic equipment, and that in that [251] particular transaction no money was involved. That is my recollection of the testimony. There was another transaction where there had been some three hundred and some odd dollars, and merchandise had been returned and money refunded, \$360.50, and, I believe, she had the cancelled check with her on the stand. That was another transaction. Then she said the only other thing was the exchange of certain equipment where no money was involved.

Mr. Royston: I am referring to \$360.50 item which Mrs. Larson testified about when she produced the cancelled check.

Mr. Parker: What is the question? Will you read the question?

(The last question was read by the reporter.)

Mr. Royston: That is this \$360.50.

(Testimony of Howard H. Whitsett.)

Mr. Parker: It is a double barreled question.

Q. Did you find anything in examining Dr. Lutfy's checks which were in regard to this \$360.50 transaction?

A. Yes. We saw the check and it was charged to drugs and supplies.

Q. Was that the check for Dr. Lutfy in payment of this \$360.50? A. That is right.

Q. It is charged on his records as how?

A. As drugs and supplies. [252]

Mr. Parker: I object to that as having been asked and answered.

The Court: Objection sustained.

Q. In examining Dr. Lutfy's deposit slips, did you find any reference to this \$360.50 refund which Westen's Camera Company made to Dr. Lutfy by check? A. It was listed on his deposit ticket.

Q. Did you ask Dr. Lutfy what that particular item on his deposit slip reflected?

A. Yes. He said that represented a camera that he had returned and got his money back.

Q. After this money was returned, did the Doctor's record reflect it had been removed from the expense item under drugs and supplies?

A. No, sir.

Q. In other words, he still credited it under drugs and supplies as an expense, even though the money had been returned to him?

A. That is right.

Mr. Parker: That is leading and suggestive.

The Court: Don't lead the witness, Mr. Royston.

(Testimony of Howard H. Whitsett.)

The Clerk: Government's 36 for identification.

Q. Mr. Whitsett, I will show you Government's 36 for identification and ask you if you have ever seen the original of those photostatic copies? [253]

A. Yes.

Q. Where did you first see the original?

A. In the Doctor's office.

Q. Were they located in the Doctor's records?

A. The first page in the log book and the others among his expenses listed for '46.

Q. A page was in the log book and a page in the expense listings?

A. Those summary sheets of expense listings that he made his return from.

Q. Did you make these photostats from the original of those documents?

A. They were made from the originals, yes.

Mr. Royston: I will offer 36 for identification into evidence. [254]

* * *

Direct Examination

(Continued)

By Mr. Royston:

Q. I believe the last thing I did with this witness was offer Government's Exhibit 36 for identification into evidence.

Mr. Parker: If your Honor please, we would like to [260] have an opportunity during the lunch hour to examine the original of that document prior to its admission into evidence. We have the original

(Testimony of Howard H. Whitsett.)

but it is not in the courtroom and we would like to examine it.

The Court: Very well.

Mr. Roylston: I have no objection. I will reoffer it later.

Q. (By Mr. Roylston): Now, Mr. Whitsett, I am going to show you Government's Exhibit 27 in evidence which is a photostatic copy and ask you if you ever saw the original of that document?

A. Yes, I have.

Q. Where did you see it?

A. In the Doctor's office.

Q. Did you make this photostat from the original?

A. Yes. We had it made from the original.

Q. Was this furnished to you as part of Dr. Lutfy's records? A. Yes, sir.

Mr. Roylston: I will offer this in evidence at this time, 27 for identification. I don't believe we asked Mrs. Sprague to be excused. May she be excused?

Mr. Parker: No objection.

The Court: She may be excused.

Mr. Parker: If your Honor please, the objection I [261] would like to register to this exhibit is that what is expressed with reference to the depreciation items in relationship to the bill of particulars furnished.

The Court: It may be admitted subject to the motion you made heretofore.

Q. Now, you heard Julia Sprague just testify as to her employment with Dr. Lutfy?

(Testimony of Howard H. Whitsett.)

A. Yes, sir.

Q. Were you able to find in Dr. Lutfy's records any record of payment of salary to Julia Sprague?

A. Yes. On the 1947 year and on one of the pages for cash expenditures, I believe it was December of '47, there was a notation under salaries \$1000, Julia Sprague, or Mrs. Sprague, or Sprague, and I asked the Doctor who that was. He explained that it was the lady that worked at his home.

Q. Did you discuss with Dr. Lutfy at that time whether this salary had been charged as a business expense or a personal expense?

A. Yes. It was charged as a business expense and he contended it was a business expense and it was added in the salaries claimed.

Q. I can't hear you.

A. He contended it was a business expense and it was added in the salary expense that was used as a deduction on the return. [262]

Q. Is that salary expense charged against his practice as a physician? A. Yes.

Q. Now, you heard Hannah Stein, the lady from Rosenzweig's Jewelry Store, testify concerning certain purchases Dr. Lutfy made from Rosenzweig's?

A. Yes.

Q. You heard her testify part of these items were compotes or candy dishes? A. Yes.

Q. Did you find any place in Dr. Lutfy's record where this particular item was listed?

A. Yes. It was charged, the payment to Rosenz-

(Testimony of Howard H. Whitsett.)

weig's was charged as expense in the drugs and supplies.

Q. That was charged under drugs and supplies?

A. Yes. It was charged, the payment to Rosenzweig's was charged to drugs and supplies.

Q. You heard Mrs. Ruppelius from Coles Furnishings in Phoenix testify concerning a Marietta dining room set? A. Yes.

Q. Did you find anywhere in Dr. Lutfy's record where this dining room set was listed?

A. Yes. It was charged under automobile expenses.

Q. Did you ask Dr. Lutfy anything concerning—did you discuss that matter of a check to Coles with Dr. Lutfy? [263]

A. Yes. He said it was the purchase of a gift.

Q. And it was charged out of—

A. Automobile expense.

Q. Mrs. Ruppelius testified that particular dining room set had been returned by Dr. Lutfy and a payment made of a refund of money. Did you find any record where that repayment was deducted from Dr. Lutfy's record? A. No, I didn't.

Q. Was it still carried?

Mr. Parker: Mr. Royston, my recollection of her testimony is it was refunded in '49. He wouldn't find that in the '48 records.

Mr. Royston: I didn't recall that. She had a cancelled check.

Mr. Parker: The cancelled check showed it was '49—I beg your pardon, it was 2-18-48.

(Testimony of Howard H. Whitsett.)

Q. Did you find anywhere in the Doctor's record where he had deducted that amount which was refunded to him? A. No, sir.

Q. You heard the gentleman, I don't recall his name, who testified he was from Dorris-Heyman in Phoenix? A. Yes.

Q. You heard him testify concerning the purchase of a French Provincial table?

A. Yes. [264]

Q. In Dr. Lutfy's record did you discover any record concerning the purchase of that French Provincial table?

A. Yes. The check was deducted as drugs and supplies.

Q. Did you discuss that particular item listed under drugs and supplies with Dr. Lutfy?

A. Yes. He identified it as the purchase of a diathermy couch.

Q. As what? A. Diathermy couch.

Q. Now, concerning the Lincoln automobile. Did you have any discussion with Dr. Lutfy concerning the purchase of that automobile?

A. The one that was stolen?

Q. That Lincoln Continental Convertible.

A. Yes.

Q. Did you ask Dr. Lutfy where he obtained \$5400 and some odd dollars to purchase that automobile?

A. It was written from his bank account.

Mr. Parker: What was the answer to that? Read the question and answer.

(Testimony of Howard H. Whitsett.)

(The last question and answer was read by the reporter.)

Mr. Parker: I move to strike it as not responsive.

The Court: It may be stricken.

Mr. Royston: With the exception of questioning this witness further concerning this document which Mr. Parker [265] wants to examine during the noon hour, I am through with the direct examination, but I would like to reserve the right to question him a little further concerning that one particular document.

Cross-Examination

By Mr. Parker:

Q. I believe you stated you had been with the Internal Revenue Bureau, or the Internal Revenue Service, or whatever it is called, for seventeen years? A. Yes, sir.

Q. Have you been doing the same type of work during the entire seventeen years?

A. Since 1940, fourteen years.

Q. That work is largely auditing then, I take it?

A. Yes.

Q. And testifying in court?

A. Well, that has been a small part of it.

Q. Are you an accountant?

A. Yes. I am a graduate from an accounting university.

Q. What was that?

A. I graduated from an accounting university.

(Testimony of Howard H. Whitsett.)

Q. What university?

A. Benjamin Franklin in Washington, D. C.

Q. Is that a school where you attend in residence or [266] correspondence school?

A. No. I lived in Washington and attended.

Q. How long did your accounting course require?

A. That was a three-year accounting course.

Q. Did you finish the whole three years?

A. Yes, sir.

Q. Are you a Certified Public Accountant?

A. No, sir.

Q. Have you ever been in this or any other state? A. No, sir.

Q. When did you get out of school?

A. 1940.

Q. In 1940? A. Yes.

Q. Were you working already for the Revenue Bureau during your school days?

A. That is right.

Q. Then you continued on with them after you got out of school?

A. That is right, sir.

Q. Since you finished your accounting training you have never been employed by anybody but the Bureau of Internal Revenue?

A. No, sir, that is all.

Q. For the past fourteen years you have been working in [267] the field of auditing tax returns and that sort of thing?

A. That is right, sir.

(Testimony of Howard H. Whitsett.)

Q. Have you appeared frequently in court as a Government witness? A. Just once.

Q. Just one time?

A. Just once previously.

Q. You mean to say this is your second appearance as a witness? A. That is right, sir.

Q. In the whole fourteen years?

A. That is right, sir.

Q. Mr. Whitsett, I notice on this Exhibit 34, the final item at the bottom of the exhibit you have labeled Unreported Net Income. Do you consider that an accurate designation? A. Yes, sir.

Q. For your technical purposes, perhaps, but isn't it a fact that these sums which you have set out opposite the title Unreported Net Income are not, in fact, unreported income?

A. No. I would say they were unreported income.

Q. The fact is, Mr. Whitsett, that what you mean by unreported net income is simply this: that the taxpayer arrived at one conclusion after making the deductions claimed by him as to his net income, and you after exercising your [268] judgment as to what deductions were proper arrived at another figure? A. That is right.

Q. That is what it amounts to, isn't it?

A. That is right.

Q. In other words, it is just a question of a difference in what deductions are taken or allowed, that is primarily what it is, isn't it?

A. Not entirely deductions.

(Testimony of Howard H. Whitsett.)

Q. But it is primarily. Now, I notice here for 1946 Dr. Lutfy reported receipts from his professional business at \$21,947.70, and rents received \$2,325. Then he took certain deductions which you have disallowed and as a result thereof Dr. Lutfy and his accountant come to a different result than you do, and that is what you mean by saying unreported net income. That is primarily what you mean?

A. It wasn't all deductions. There were some additional rents and as I stated, we were unable to establish the exact gross income from the medical practice, so I couldn't say it was all deductions.

Q. His records showed it at \$21,947.70?

A. His log book showed that.

Q. He had a record to substantiate that, his log book showed that?

A. That is right. [269]

Q. His record showed \$2,325 in rent, or did it show more?

A. In two of the years it showed more. I am not sure just which year it showed more. I would have to look at my work papers to see which years his records showed more.

Q. Now, in this particular year, '46 I am talking about, you mention here Capital Gains of \$6,918.55, and I believe you stated that represented two different transactions?

A. That is right.

Q. What two transactions are those?

A. That is the sale of his one-third interest in his property at Moreland and Central he owned in

(Testimony of Howard H. Whitsett.)

conjunction with the Cable Trust, and the vacant lot on Fifth and McDowell.

Q. You treated both of those as short-term transactions? A. I did, yes.

Q. You in your computation decided that it wasn't a long-term transaction and, therefore, one-half of it, a full one-half of it was taxable?

A. The full.

Q. All of it taxable?

A. Yes. If over six months.

Q. All of the gain was fully taxable?

A. Yes.

Q. Then you charged in your computation the full amount of the capital gain on both of those transactions and treated [270] it as ordinary income? A. Yes, that is right.

Q. Subject to the same tax as ordinary income?

A. Yes.

Q. Now, Mr. Whitsett, would you be good enough to admit there is room for debate in respect to that matter, these two transactions?

A. The revenue agent's report is never the final decision.

Q. Then I take it by that answer that it would be subject to some argument?

A. Naturally; they very often are.

Q. Did you ascertain that the Cable Trust Company, or the people owning the other two-thirds interest reported it as a long-term capital gain, did you ascertain that?

(Testimony of Howard H. Whitsett.)

Mr. Royston: I object to that, if he ascertained it.

The Court: This is cross-examination.

Q. Did you ascertain that fact?

A. I am afraid I was unable to because those years have expired and we were not permitted to go into those years from their income tax returns.

Q. If they had expired for the other people why didn't they expire for Dr. Lutfy?

A. We are on a different basis here.

Q. So you never ascertained that fact? [271]

A. No, sir.

Q. In determining, in making your determination that Dr. Lutfy had to pay the full tax on the full amount of the profit on those two real estate transaction, did you have in mind that the escrow instructions for the purchase of this Cable Trust property—and we will refer to that property as being Lot 4, Block 2, Simms Addition—as the Cable Trust property, do you have in mind that the escrow instructions are dated and filed April 4, 1945?

A. Yes, sir, I went through the file.

Q. And the escrow instructions provided for closing on or before July 30, 1945?

A. I saw that, yes, sir.

Q. Did you have in mind the fact that when a title search was made it was disclosed that one of the parties, one of the sellers, was a minor child?

A. That is right.

Q. And that he did not become twenty-one years of age until July 26, 1945?

A. It was about that date, yes.

(Testimony of Howard H. Whitsett.)

Q. And that the deed was held up until he became twenty-one years of age?

A. That is right.

Q. And that the deed itself is dated August 10, 1945?

A. That is right. [272]

Q. Did you also have in mind if in making this determination which you have made, taxing Dr. Lutfy for the full amount of these capital gains, that the Cable Trust Company and Dr. Lutfy took over this property under this transaction and received all of the rents and profits from it on and after June 15, 1945?

A. Yes, sir.

Q. Did you have that in mind, too?

A. Yes, sir.

Q. Yet, notwithstanding those facts, what particular event did you use in your own mind to determine when that property was purchased?

A. In the documents and in the file it was—there was some letter where it was stated that the guardian of this minor felt that rather than go through the trouble of going through the courts to have the property transferred, since the minor would become of age the latter part of July, they would wait until he became of age. I found in looking through the Arizona law that the minor would have a certain period of time after he became of age before he was required or had to agree and complete a transaction. He could go back on the deal that was made by his guardians within a certain period of time after he became of age if he didn't care to go ahead. It was until he made up

(Testimony of Howard H. Whitsett.)

his mind after he became of age. There was a signed document on 10 August that I [273] considered the deal could possibly have been closed without any reservation as to the actual ownership of the property.

Q. Then in your mind the Warranty Deed signed on the 10th of August by the minor child, after having attained the age of majority was, that is the thing you went on?

A. That is right. That was his first act in regard to this property.

Q. You had in mind, of course, that a deposit of \$2500 was made on this property by the purchasers, at least, Mr. Charles Becker for the purchasers, on April 4, 1945, the date on which the escrow instructions were signed? A. Yes, sir.

Q. Did you have in mind also, I believe you stated you had in mind the fact that the purchasers took over and enjoyed the use and benefits of the property from the 15th of June?

A. Yes. The title company apportioned the rents.

Q. In connection with this matter—by the way, I have been referring, ladies and gentlemen, in these questions to this Exhibit 24, the photostatic record of that transaction from the title company in connection with the sale of this property. In arriving at this decision, which you say you arrived at, and on which you based your computation, saddling Dr. Lutfy with the full amount of the capital gain, did you have in mind the escrow instructions for the

(Testimony of Howard H. Whitsett.)

sale of this [274] property was dated December 20, 1954? A. Yes, sir.

Q. And that a contract purchase was entered into by the purchaser, Mr. Stanley J. Mahurin and wife, dated December 20, 1945? A. Yes, sir.

Q. I am referring to escrow, I think the contract is dated the same date?

A. They usually are.

Q. But the escrow instructions provided in this case, the escrow instructions signed the 20th of December, provide here, "hereby parties," the seller and the buyer, "hereby employ Phoenix Title & Trust Company to act as Escrow Agent in connection with a sale by Seller to Buyer upon the following terms and conditions which shall be complied with by said parties"—and the printed form says, "on or before." Here they have x'd out the "on or before" and made, "on or after February 25, 1946."

A. Yes, sir.

Q. You had that in mind? A. Yes, sir.

Q. Would that not indicate to you that it was a part of their deal, that this sale was not to be made or consummated until after February 25, 1946?

A. That is possible. [275]

Q. You have had enough experience in income tax matters to know it is nothing illegal about a taxpayer setting up a real estate transaction so that it becomes a long-term rather than a short-term capital gain? A. Yes, sir.

Q. There is nothing illegal about that. It is per-

(Testimony of Howard H. Whitsett.)

fectly lawful, and as a matter of fact, it is done with considerable frequency, is it not?

A. But the deal was completed in December, payments made; or completed by the title company.

The Court: At this time we will recess until 2:00 o'clock this afternoon.

(Noon recess.) [276]

September 10, 1954—2:00 P.M.

HOWARD WHITSETT

resumed the witness stand.

Cross-Examination

By Mr. Parker:

Q. Mr. Whitsett, continuing the line of inquiry which I was pursuing before the noon recess in connection with this Cable Trust transaction and inquiring into the considerations which you had in mind with respect to your determination to compute the tax on behalf of the full amount of the capital gain, I will ask you if you had in mind that this agreement for the sale of real estate, dated at the top of such agreement on the 20th day of December, 1945, the same day as the escrow instructions, wasn't executed by the purchaser until January 18, 1946, and not executed by the seller, Mr. Eisele, for the seller until January 21, 1946, were you aware of those facts? A. In the sale of it?

Q. Yes, the contract of sale.

(Testimony of Howard H. Whitsett.)

A. That is right.

Q. Now, did you ascertain in connection with your investigation of this transaction that due to the fact that the Cable Trust Company, and assisting Mr. Decker and Mr. Eisele and the defendant, Dr. Lutfy, took over the property though on June 15, 1945, and taxes were prorated to that date in connection with the settlement of this transaction to purchase, that the title [277] company determined that the date of purchase was June 15, 1945, and so advised the parties. Were you aware that that determination had been made and that advice given to the parties by the Phoenix Title and Trust Company?

A. I talked to one of the officers of the Phoenix Title and Trust, they said they made no determinations in any case, that wasn't for them to decide. It was the agreement of the parties the rents were to start as of June 1 and they apportioned the rents and taxes, whatever it was, according to those dates. But the sellers, in view of the fact the sellers could not give clear title until this minor became of age I couldn't say the property actually changed hands and the title was transferred until such time.

Q. When the purchasers started receiving the income and paying the taxes on the property that meant nothing to you?

A. It wasn't conclusive, the date of sale.

Q. Not in your mind?

A. Not in my mind, no, sir.

(Testimony of Howard H. Whitsett.)

Q. Did you talk to someone at the title company, do you remember who you talked to?

A. I believe it was Mr. Rhoads.

Q. And he is head of the escrow department?

A. That is right.

Q. And he was not the gentleman who handled this escrow?

A. No. I was asking his opinion on the dates of sale of [278] the property and as to whether or not they would hold and he said they did not make such determinations.

Q. Mr. Rhoads didn't make such a determination?

A. He said the title company does not make such a determination.

Q. The title company is a corporation, it can act only through its employees? A. Yes.

Mr. Royston: I object to that as argumentative.

The Court: It is argumentative.

Q. (By Mr. Parker): Mr. Whitsett, you didn't talk to Mr. W. J. Ladyman, the officer who handled the transaction, did you?

A. No, I don't believe I did.

Q. Now, with reference to this other transaction which enters into this sum of \$6918.55 upon which full amount you computed tax, did you examine the escrow papers and the deed which are in evidence here as Government's Exhibits 20 and 23?

A. Yes, sir.

Q. In making your determination of that matter? A. Yes, sir, I did.

(Testimony of Howard H. Whitsett.)

Q. Now, did you observe and bear in mind in making the determination which you did make that this was a short-term capital gain rather than a long-term which would be where the property is held six months or more—I think we have [279] neglected to define to the jury what we are talking about in “short-term” and “long-term capital gains.” Any property held six months or more by the owner before selling is referred to as a long-term capital gain? A. That is right.

Q. If the deal is made, the sale is made in less than six months it is referred to as a short-term capital gain? A. That is right.

Q. Now, in the sale of that property I asked you if in your investigation of it if you had in mind the letter of Mr. Guy Fisher, the real estate broker, dated March 18th, 1946, wherein he advised the Arizona Title Company that this deal is to be closed on or about March 25th, 1946?

A. Yes, I saw that.

Q. You saw that? A. Yes.

Q. You also saw these other papers in connection with the transaction, including the escrow agreement; and did you observe the check that was made by the Title Company, Arizona Title Guarantee and Trust Company to Louis P. and Bertha A. Lutfy, in the amount of \$6250.72, dated March 26, 1945?

A. Yes, I saw that check. I also saw the check from the purchaser on February 11th for the balance of the purchase price.

(Testimony of Howard H. Whitsett.)

Q. Payable to whom? [280]

A. To the title company.

Q. Payable to the title company.

A. And I believe on this statement the taxes are prorated as to March 1st, if that is a determining factor.

Q. I didn't say it was. A. Well——

Q. You said it wasn't just a moment ago.

A. I am just drawing your attention to the fact the taxes on this statement are prorated to March 1st. But the entire deal was consummated by the time the money was all paid in.

Q. I mean that is in your opinion?

A. In my opinion.

Q. That is a legal matter, is it not?

A. It just laid there for about a month before anything further was done to it.

Q. I understood you said that was perfectly all right and people did make real estate transactions whereby the transaction was not closed or to use your term, consummated, until after the six-month period had gone by?

A. In that respect I talked to one of the men at the Arizona Title Company and asked them——

Q. Well now, you are not going to give us hear-say testimony?

A. No. I spoke to one of the men—I can't tell you what [281] his name was—however, one of the officers; asked him if parties to a transaction came in with—entered into an escrow agreement and

(Testimony of Howard H. Whitsett.)

said, "We don't want this deal to go through for so many months"——

Q. Pardon me for interrupting, Mr. Whitsett. I feel that is hearsay testimony and not responsive to my question I asked you. As to the Phoenix Title and Trust Company I asked you a question I think justified the answer; I haven't asked you such a question as to this transaction, therefore I don't think I would want hearsay on that as to what he may have said about it. Now, you observed the deed which is Government's Exhibit 20 in evidence by which Louis P. Lutfy and his wife conveyed this property to Philip Lantin and his wife, and that this deed, although it bears date of January 12, 1946, was recorded on March 27, 1946, at 9:00 a.m. at the request of the Arizona Title Guarantee and Trust Company. You were aware of that at the time? A. Yes, sir.

Q. Mr. Whitsett, do you have a copy of this Exhibit 34? A. Not right now.

Miss Reimann: Is that 34?

Mr. Parker: Could he have that? In the following year, 1947, this item of \$2,363.16 listed here as a capital gain, what is that?

A. I forget just which car that was the Doctor sold. He [282] bought it in December and sold it in January, was a matter of almost days. It was reported that way on his return.

Q. So you had nothing to do with that determination? A. No, sir.

(Testimony of Howard H. Whitsett.)

Q. It was correctly, in your opinion correctly reported on the return?

A. That is right. His check and his receipt I believe also back up those same dates.

Q. Now, the \$941.82 for 1948, I understood you to say one-half of the capital gain on a real estate transaction which you determined to be a long term?

A. That was the sale of his home.

Q. The sale of a home. Mr. Whitsett, I would like to ask you preliminarily if you did not furnish to the United States Attorney certain information upon which he predicated a bill of particulars or at least a reply to a motion for further particulars, in which the information is furnished to us that the amount claimed as a deduction resulting from the theft of the Lincoln automobile in 1947 has been disallowed in part. Did you not furnish the United States Attorney that information?

A. I don't believe I did, no.

Q. Did some of your associates to your knowledge?

A. I believe whatever figure was arrived at was taken from the files in the Court in Phoenix, but I didn't even see [283] the file.

Q. As I understand it here, in your own determination, referring to paragraph, Roman numeral XI here, and the year 1947, and this car which was stolen in that year, you have disallowed in your own determination completely the cost of that car?

A. That is right, sir, he had a claim——

Q. And you have by so disallowing it you have

(Testimony of Howard H. Whitsett.)

added that to the column entitled "living expenses for 1947." A. That is right, sir.

Q. Thus adding \$5,420 to that total for that year? A. That is right, sir.

Q. Now, Mr. Whitsett, do you know or have any way of ascertaining who furnished the United States Attorney with the information which I read to you from this bill of particulars, saying that the deduction resulting from the theft of the Lincoln automobile in 1947 had been disallowed in part?

Mr. Royston: I object to this because the figure to which they have been testifying on Exhibit 34 is stipulated to. That figure is stipulated to between counsel. Now, if they are trying to show a discrepancy some place it is a matter stipulated to.

Mr. Parker: It is stipulated as to the cost of the Cadillac.

The Court: Objection overruled. Go ahead. [284]

Q. (By Mr. Parker): Could you answer that last question?

A. I had nothing to do with the drawing of this. However, the Doctor claimed more than the \$5400, if that is what you mean.

Q. Yes. He claims some expenses he incurred——

A. \$6700, something like that.

Q. Trying to get the car back, 'phone calls, and so forth, he originally claimed over \$6,000?

A. Yes, \$6700, I think.

Q. Now, in your investigation of the matter of this stolen car you learned, did you not, that the car was stolen that year, the year that is indicated

(Testimony of Howard H. Whitsett.)

here, and that the insurance company carrying the fire and theft and comprehensive insurance on it refused to pay the claim for the loss of the car?

A. That is right.

Q. And you also learned in your investigation that Dr. Lutfy had to sue the insurance company and carry the case all the way to the United States Court of Appeals at San Francisco before he got a judgment for his loss?

A. I don't remember at the time whether he had gone that far, but I know he had to sue.

Q. And that he did get a judgment at the hands of the Court for——

A. Oh, yes. [285]

Q. ——for the amount of his loss of the car?

A. Yes.

Q. That when he collected that judgment in years later than 1948 he reported that, the net on that, as income. Did you learn that?

A. At the time I made the investigation he hadn't received the money and he was, he felt quite positive he would and I informed him that the loss was not deductible in the year of the loss since he had a claim; and when he received the money any loss between the amount of money he received and that he had spent would be deductible in that year and to not report the income. What he did on the matter I do not know.

Q. Deducting it as a loss in the year when it was lost and reporting it as income in the year in which the judgment was paid results in no evasion

(Testimony of Howard H. Whitsett.)

of taxes or any deception of the Government in any way, does it?

A. I haven't alleged evasion on this item that I know of.

Q. Well, I am reassured to have you admit that so far as you see it there was no evasion in there. Now, Mr. Whitsett, you previously stated that you and Mr. Tucker worked on this case in the investigation of it, preparation of it. Did any other employee of the Government work with you or in association with you in the investigation and preparation of the case?

A. Not materially. There may have been some assistants on [286] one or two items of some type.

Q. I am referring to Mr. Cass, the regional attorney from Los Angeles. A. Yes.

Q. He took quite a hand in it, did he not?

A. Yes, sir.

Q. Came to Phoenix twice, at least twice?

A. Three times, I think.

Q. Three times. The last time he came in the latter part——

Mr. Royston: I fail to see any relevancy.

Mr. Parker: This is preliminary, your Honor. I propose to show——

The Court: I will treat it as preliminary and let you proceed.

Q. (By Mr. Parker): ——came to Phoenix the last time in the latter part of May and stayed until about June 6th or 7th, somewhere along there, of this year? A. Something like that, yes, sir.

(Testimony of Howard H. Whitsett.)

Q. During that time you and Mr. Tucker and your regional counsel, Mr. Cass, were in conference with me a time or two, were in conference with Mr. Moser here, the accountant who at that time had most of Dr. Lutfy's records, and you spent quite a bit of time with Mr. Moser, did you not?

A. Several hours, yes.

Q. You are aware that Mr. Cass did utilize the investigation material which you and Mr. Tucker had developed for him? [287]

A. Yes, he was preparing to try the case.

Q. You were doing what we would refer to as the leg work and he was assembling the information and preparing the case?

A. I suppose you would phrase it that way, yes.

Q. In the course of that preparation and from the material which you furnished him, Mr. Cass prepared quite a lot of proposed stipulations which were submitted to me by the Government as in the role of attorney for the defendant?

A. Are you speaking of the first list of——

Q. Yes, sir. I am speaking of the original proposals. There were about three or four installments of them.

A. I did not assist in those.

Q. You knew he had prepared them from the data furnished him by you and Mr. Tucker, did you not?

A. Yes, they would have to be prepared from that.

Q. Are you aware that one of these proposals——

(Testimony of Howard H. Whitsett.)

Mr. Royston: I object to reading this unless it is a stipulation, because all this background stuff is completely hearsay and I don't know a thing about it.

The Court: This stipulation was never entered into?

Mr. Parker: Yes. They proposed it and we signed it.

The Court: It was never signed by both sides?

Mr. Parker: It was never signed by both sides——

Mr. Royston: There was a lot of this hassling went on I wasn't in on. [288]

The Court: I will sustain the objection.

Q. (By Mr. Parker): Mr. Whitsett, I will ask you this: Did you not at one time during the course of this investigation arrive at quite a different set of figures for living expenses during these three years than those which you have now submitted on Exhibit 34?

A. We have eliminated a great many items that could be argumentative and have just the, almost most of them are the ones you and the counsel have stipulated to with a few exceptions, is all we have put in.

Q. I will put it this way: I think you misunderstand my question. I will ask you whether or not a matter of some approximately five or six months ago your figures for the living expenses paid by check for the year 1946 was \$3,838.67, whereas you now submit a figure of \$4,683.09, is that not true?

(Testimony of Howard H. Whitsett.)

A. Again I will have to say that was made up in Los Angeles by Mr. Cass and his technical assistant over there. I did not assist in the preparation of the figure.

Q. I understood you to say you and Mr. Tucker furnished him with the data——

Mr. Royston: I think this is highly improper, the fact Mr. Parker and Mr. Cass couldn't agree on stipulations has nothing to do with the testimony of this witness.

The Court: He asked this witness if he did not within the past five or six months arrive at a certain figure. The [289] witness has testified that he didn't. The question was asked and was entirely proper. It has nothing to do with the stipulation, it was what this man arrived at.

Q. (By Mr. Parker): I will ask you, Mr. Whitsett, if it isn't a fact that five or six months ago, approximately, you had arrived at a figure for the living expenses of the defendant and his family paid by checks for the year 1947 in the sum of \$5,337.72, whereas you now submit a figure on your Exhibit 34 of \$6,967.72, is that not true?

A. No, sir. Again that is the figure compiled in Los Angeles.

Q. Did you compile figures covering living expenses by checks approximately six months ago or prior thereto? A. No, sir.

Q. You never did? A. No, sir.

Q. During the investigation of this case you never compiled any figures?

(Testimony of Howard H. Whitsett.)

A. Well, our investigation was three years ago. I compiled for my technical report and expenses listed in that, they are greatly in excess of either of these figures.

Q. Greatly in excess of either of those figures?

A. That is right. They picked out certain ones they wanted to ask you to stipulate to, is all.

Q. Did you furnish the figures? [290]

A. They took off of my working papers in Los Angeles, but what they took off I don't know.

Q. I will ask you if you did not five or six months ago have on your working papers a figure for living expenses for the defendant and his family for 1948 \$5,222.63 as opposed to \$5,660.61 on your Exhibit 34?

A. Again I will say that was compiled in Los Angeles at the same time the other papers were.

Q. You say you were not present over there at any time? A. No, sir.

Q. You never went over there with Mr. Cass?

A. No, sir.

Q. He took your working papers?

A. That is correct.

Q. Took them with him to California to compile these various figures?

A. That is correct, sir.

Q. Then you say originally you had a figure much larger than either of the figures I have suggested or figures contained in your Exhibit 34?

A. On my technical report the figures on all three years are much larger.

(Testimony of Howard H. Whitsett.)

Q. I take it it is true that what figure you come up with depends somewhat on who does the figuring?

A. It depends on how much of it they want to bring into [291] Court.

Q. Now, Mr. Whitsett, the living expenses under the subtitle B here, cash, those you have marked "estimated" and therefore I take it that there is no exact information on that?

A. Those are the Doctor's estimates.

Q. Those were the Doctor's estimates. And the same figure for each of the years 1947 and 1948?

A. That is correct.

Q. Now, Mr. Whitsett, did Dr. Lutfy during this examination tell you that he purchased most of his groceries in cash?

A. There were no checks outside of perhaps one or two to indicate that there was any groceries purchased and he agreed they must have been purchased by cash.

Q. Now, did he tell you that he had relatives or close friends who were in the grocery business?

A. Yes, he did.

Q. And that he bought his groceries in wholesale quantities, at least at wholesale prices?

A. Yes, sir.

Q. By the way, Mr. Whitsett, in arriving at the computations contained in your Exhibit 34, as well as the computations contained in your Exhibit 33, the so-called net worth statement, I will ask you if you made any allowance at all in any of the three

(Testimony of Howard H. Whitsett.)

years herein involved for cash gifts from [292] Mrs. Linsenmeyer, the grandmother of the Lutfy children, the mother of Mrs. Lutfy?

A. I believe on March 16th when Mr. Tucker and Mr. Racey and I and the Doctor——

Mr. Royston: I am sorry, I can't hear you.

Mr. Parker: Pardon me, Mr. Whitsett, you could answer that readily yes or no. I might have a further question or if you have something to explain I am sure the Court would agree your counsel can ask you about it. I just said did you make an allowance for any cash gifts or benefices from Mrs. Linsenmeyer to the Doctor and family or wife and family?

A. No, I didn't, because he said there were none.

Q. Because he said there were none?

A. That is right.

Q. Now, did you make any allowance in your computation of either of these two exhibits for the sale by Mrs. Lutfy of her piano in 1947 for the sum of \$475, which was paid in cash?

A. This is the first I have heard of the sale.

Q. This is the first you have heard? Then I take it you did not make any such allowance. Now, did you make any allowance in the computation of either Exhibits 33 or 34 of a loan made to Dr. Lutfy in the general vicinity of September 18, 1947, by Mrs. Linsenmeyer in the sum of either \$3200 or \$3500, and which has never been repaid? [293]

A. No, because I asked the doctor if there were any other loans and he said that was all.

(Testimony of Howard H. Whitsett.)

Q. Now, to clarify this matter a little bit. I understood you to say unequivocally that Dr. Lutfy paid for this Lincoln automobile by check out of his personal bank account?

A. I would have to look at the record, my work papers, to see whether he did or didn't.

Q. I understood you to say awhile ago when Mr. Royston questioned you specifically on that point that it was paid by his check?

A. I believe it was paid by check, I don't know.

Q. Would it refresh your recollection any if I suggested to you that although a check was at one time issued the check was never honored and never paid out of Dr. Lutfy's account; and that this car was purchased in cash?

A. Are you speaking of the car that was stolen or the car that he attempted to buy in Tucson?

Q. I think it was the car he attempted to buy in Tucson. I may be confused about the two cars. The same car that was stolen?

A. The doctor explained both transactions.

Q. By "both transactions" which is the other transaction you are referring to?

A. The doctor had been looking for a—I don't know whether they were both Lincolns or not—and he heard of one [294] here in Tucson and in some manner or other the deal was all consummated within one year so it did not effect the net worth and I can't give you too direct a story on it because I didn't have to remember the details. But a check was put through the bank here in Tucson, the doc-

(Testimony of Howard H. Whitsett.)

tor's check, which he was to cover in Phoenix if the car was delivered. I don't know whether it was a postdated check or something of that nature, and this bank called the bank in Phoenix. I think the amount was \$5505. They called up and asked if there was 5505 in his bank account and they said "Yes," thinking it was \$55.05; told the bank to honor the check and then the bank forced him I believe to pay that money then. I don't know whether he actually went to suit for it, Court for it, or not, but the bank refunded the money to him. That deal and the other deal were within practically the same time. So just what happened to each one I am a little vague on.

Q. I am advised this was only one deal, but be that as it may.

A. That might be too, I don't know.

Q. That check you know was never paid out of his bank account, don't you? A. That is right.

Q. And you know or did you ascertain in your investigation that in connection with this matter he had borrowed either \$3200 or \$3500 in cash from Mrs. Linsenmeyer? [295]

A. Not at the time of the investigation. I heard something about it—as to who told me or where I heard it since then I couldn't say, but at the time of the investigation I knew nothing of that loan.

Q. And did you not ascertain either at that time or later that simultaneously or about the same time and for the same purpose he had borrowed the \$3500 from Mrs. Linsenmeyer he borrowed \$1,000 from his cousin, Eddie Basha, of Chandler, the grocer?

(Testimony of Howard H. Whitsett.)

A. We saw the receipt in the bank for \$1,000 from Bashas and we questioned him about that and he said he didn't remember whether he had loaned his cousin the \$1,000 and that was where he paid it back or that was where he borrowed it, and he was uncertain as to what that situation was. He said, "We don't owe anything to each other," and it was settled soon after that as far as we knew anything about. So at the end of the year as far as were ever given any information effecting the final net worth.

Q. Yes. I am not suggesting that Eddie Basha was not repaid, he was. But Mrs. Linsenmeyer was never repaid her \$3,500 and you say you did hear that later on?

A. I have heard that since then, but where I don't know.

Q. Now, Mr. Whitsett, did you learn in the course of your investigation of the affairs of Dr. Lutfy that in 1944 his mother repaid to him money which she had previously borrowed [296] in the sum of \$4400?

A. Yes, sir.

Q. Mr. Whitsett, is it not true that in computing the figures here on this Exhibit 34 you resolved all doubts against the taxpayer and eliminated most of the deductions which he had claimed in his return?

A. Deductions have no bearing whatsoever in a net worth case.

Q. I am referring to Exhibit 34, the computation of the tax.

A. The only place deductions would figure in this is whether or not it was a personal item or business

(Testimony of Howard H. Whitsett.)

item; and the only ones we took were the personal items.

Q. You of course, do you mean to say that you could go over a man's records for the year, say the Judge's records, and his cancelled checks and unerringly tell which were personal items and which business items if he were in a business or profession?

A. If the Judge were there and identified them as to what they were for I could.

Q. You think you could then? A. Yes, sir.

Q. You could determine of course if it bought gifts at Christmas time for his clients or patients, you would have no difficulty determining if those were personal or in connection [297] with business or profession?

A. Those would be questionable by either side.

Q. Questionable by either side. Then you do admit there is an area where they would be questionable, I mean debatable or at least susceptible to more than one interpretation?

A. Any deduction is necessary or can be insisted that some form of proof other than the just the payment would be produced.

Q. Now, I take it that in computing this Exhibit 34 you probably disallowed in your own mind and for the purpose of your computation all expenditures in connection with his office which you considered to be capital investments, did you not?

A. I capitalized a few of the items, yes, sir. They were very small ones.

(Testimony of Howard H. Whitsett.)

Q. Is it not true that it is a practice fairly common in the field of income tax and accounting that some firms will capitalize and enter into their capital account, oh, the purchase of a dozen pencils or wastebasket, whereas others follow a practice of not capitalizing an expenditure unless it is \$50 or \$100 or some other established sum, even \$500 in some instances?

A. It depends entirely on the use of that article whether it is of a capital nature.

Q. Well, the question I am asking you is it not a standard practice commonly in use among business firms, for instance, to [298] have some established standard in terms of cost at and above which they capitalize the purchase, and below which they charge to expenses? A. Not necessarily, no, sir.

Q. You say not necessarily. I didn't say necessarily.

A. Well, from my experience as a revenue agent that hasn't been a consistent policy. Occasionally you will find and you check it just the same as anyone else.

Q. I want to ask you, Mr. Whitsett, inasmuch as you made some point of a bank account in Mrs. Lutfy's name by her nickname, of course, at the Bank of Douglas of \$3,020 savings and a checking account of \$437.85 at the end of the year 1945——

A. I am sorry, I was getting the Exhibit.

Q. I am referring to item five among the checking accounts and item three among the savings ac-

(Testimony of Howard H. Whitsett.)

counts for the year ending 12/31/45. A. Yes.

Q. I want to ask you if in your investigation of this matter you learned or discovered that in 1945 Mrs. Lutfy had sold a diamond ring to a friend for \$3,500 and that she deposited this money in the Bank of Douglas in these two accounts?

A. That is the account we didn't find until last year.

Q. I beg your pardon. I move to strike it as not being responsive to the question, your Honor.

The Court: Read the witness the question. [299]

(The last question was read.)

The Court: You can answer that yes or no.

A. No, I didn't find that. I wasn't investigating it.

Q. (By Mr. Parker): Your investigation then was not at that time concerned specifically with the proceeds of the sale of property, you were looking for a taxable income, were you not?

A. We only set up the ending balance of that year. You say this was in '45?

Q. Yes, sir.

A. There was just \$437.85 left in the account, in that one account, and \$3,000 in the other one.

Q. Yes.

A. We put in the ending balances which in effect reduced the income for 1946.

Q. Mr. Whitsett, the point really of my question, to be perfectly frank about it, you had insinuated, at least I thought, in your testimony in chief, I thought you were insinuating to this Jury that Dr.

(Testimony of Howard H. Whitsett.)

Lutfy in answering the questions originally put to him about bank accounts, about his bank accounts, I understand that you asked him, that you were insinuating he was trying to conceal this bank account or these two bank accounts of his wife. And I am just simply suggesting to you or asking you if you didn't discover at some later time at least the nature of these two bank accounts in his wife's [300] name and where the money came from that went into them?

A. No, sir. We only took the balances at the end of that year. We did not go into the prior year and determine the sources of the funds.

Q. Then at the time you made this investigation you were not interested in the source of funds which he had in his year-end bank balances?

A. Not at the beginning of that period.

Q. Yes. Then I take it if that statement be true you would not want to suggest to the Jury that Dr. Lutfy had concealed anything from you in which you at that time had any particular interest?

A. Well, I don't know whether he knew about the bank account or not.

Q. Mr. Whitsett, do you recollect a conversation with Dr. Lutfy at his office probably in January or February of 1950 in the presence of Mr. Tucker?

A. It would be 1951, I think.

Q. 1951, I beg your pardon, at which there was a conversation about whether or not Dr. Lutfy should charge off to professional expense the telephone at his home. Do you remember? You can an-

(Testimony of Howard H. Whitsett.)

swer yes or no if you remember such a conversation?

A. Yes, sir, there was a conversation as to the telephone expense.

Q. He had told you at that time since he got a great many [301] of his professional calls on his home 'phone and that they outnumbered his social calls he felt he should be able to charge that 'phone to his professional expense?

A. That was never added to his personal expenditures at all. We did not add it to his personal expenditures.

Q. You did not? A. No.

Q. My question was didn't he tell you at that time he felt that was a proper——

A. Yes, his argument was it was more professional than personal.

Q. Mr. Whitsett, I don't mean to offend you or embarrass you, but I wish to ask you this question. Did you not at that time and place and in the course of that conversation say to Dr. Lutfy, in substance: "You doctors are getting away with murder. I am going to take away all your deductions and let you fight to try to get them back." Did you not make that statement in substance, in substance that statement? I wouldn't say they were the exact words, but in substance make that statement to Dr. Lutfy at that time in the course of that conversation?

A. I couldn't affirm or deny that, but I don't remember.

(Testimony of Howard H. Whitsett.)

Q. You don't remember? A. No, sir.

Q. Now, Mr. Whitsett, I believe that you discussed— [302] maybe there is an error in recalling this—that you discussed with Dr. Lutfy the matter of Mrs. Julia Sprague compensation and how it should be handled or charged?

A. Yes, I discussed that on my first visit with him.

Q. Did he not tell you in substance as follows: That one of her principal functions was to answer the telephone at night when he and his wife were away, or other times when patients might call at the house, did he not tell you that?

A. That was what he said, yes, sir.

Q. That is all I am asking you, just what he said. Did he not tell you that she also did some housework and some baby sitting? A. Yes, sir.

Q. And he did not tell you that the compensation which he was paying her was of two categories, that he was paying her \$20 a week, whatever it was, in cash and on the other hand that he was furnishing her with room and board?

A. Yes, he was furnishing room and board part of the time, I believe.

Q. Did he not also tell you that he felt that her services for answering the telephone on calls of his patients when nobody else was there to take such calls was of the value of approximately \$20 a week, the amount he was paying her in cash, and that he felt that the work she was doing as a domestic was of a

(Testimony of Howard H. Whitsett.)

value approximating the room and board which he [303] was furnishing her?

A. I don't think we went into it as completely as that. He said that part of the time she lived—for a short time she lived at the house, the rest of the time she had a home of her own and they called her as a baby sitter. She wasn't in residence, she did use the address as a mailing address and I don't know at that time whether she was, but not all the time was she in residence at his home.

The Court: At this time, Members of the Jury, we will take the afternoon recess.

(Recess.)

Q. (By Mr. Parker): Mr. Whitsett, just a few more matters. I will ask you whether or not in the course of your investigation of Dr. Lutfy's affairs you discussed with him the matter of this Phoenix Sports Shop about which you, I think, testified concerning some stationery?

A. Yes, we discussed that.

Q. Did he not tell you that shortly after coming back from the army that he had intended to open a sports shop in Phoenix, did he not tell you that?

A. I don't remember that at all, no, sir.

Q. Did he not tell you that with that intention in mind he had had this stationery or letterheads printed? A. No, I don't remember that.

Q. Did he not tell you that he discovered that he could [304] not at that time get the necessary mer-

(Testimony of Howard H. Whitsett.)

chandise and therefore he never opened such a business and for that reason?

A. No, sir, I don't remember him intending to open a business to the public, which I presume you mean.

Q. Yes. A. At all, no, sir.

Q. Did he not tell you he had deposited \$500 in a bank account in the name of the Phoenix Sports Shop at the time he was planning to open such a shop?

A. There was an opening, I believe an opening deposit of \$500 but I didn't know the reason.

Q. Did he not tell you and did you not ascertain it to be a fact that over a three-year period this bank account had gradually been depleted from \$500 to \$35.65? A. It went down.

Q. And that was through purchases for his own use?

A. I don't remember the exact action in the account right now. I would have to see the account to testify to that.

Q. You have seen the account, have you not?

A. Oh, yes.

Q. And do you not recollect there were never any deposits made in it during this three-year period or more?

A. No, I couldn't testify to that right now. I would have to see the account.

Q. Do you have a transcript of the account with you? [305] A. There might be one.

(Testimony of Howard H. Whitsett.)

Q. I wonder if you would consult your records and see if you don't have that information.

Mr. Whitsett, what do you hold in your hand now?

A. A transcript of the bank account of the Phoenix Sport Shop from the Bank of Douglas.

Q. Was that made by yourself?

A. No, sir, I am afraid this is in Mr. Tucker's handwriting. I have been present, however.

Q. You were present? A. Yes, sir.

Q. In what manner do you make the transcript?

A. This is a copy of the dates, the deposits with notes.

Q. What period does that cover?

A. It was opened on December 18, 1945, and closed October 27, 1949.

Q. Were there some few deposits?

A. Yes, there was a deposit on September 9, 1947, of \$100; on December 10, 1947, of \$300; on October 25, 1948, of \$150 and April 18th, 1949, of \$300.

Mr. Parker: I wonder if we might have that marked for identification.

(Defendant's Exhibit B marked for identification.)

Q. (By Mr. Parker): Did Dr. Lutfy tell you he was fond of hunting and did quite a bit of it himself? [306]

A. Yes, it appeared to be one of his hobbies.

Q. Did he tell you that upon learning that he

(Testimony of Howard H. Whitsett.)

couldn't, that it wasn't feasible to open a sporting goods store in Phoenix, that he had kept this firm name because he was able to buy guns and equipment for himself at wholesale by reason of having these letterheads?

A. Yes, that was an advantage that he enjoyed with that.

Q. Did he tell you that he had used this account for his own private benefit in that manner as contrasted to entering into any commercial business of buying and selling such items?

A. He said he used it for himself and bought things for other people, friends, and so forth.

Q. He not only could get for himself at wholesale but also accommodate his friends who might want a gun or some sporting equipment by getting it for them at wholesale?

A. That is right. That was his explanation, yes, sir.

Q. Did he tell you when he did so that they simply paid whatever it cost, that he made no profit on those transactions?

A. That was his explanation, yes, sir.

Q. Where he accommodated a friend that way. Now, so much for that. Mr. Whitsett, I believe you stated in your testimony in chief that you had never seen any photographic equipment in Dr. Lutfy's office?

A. I don't believe I ever saw any at the office, no, sir.

(Testimony of Howard H. Whitsett.)

Q. Are you reasonably sure of your testimony in that [307] respect?

A. I have seen some of his photographic equipment but I don't believe it was at the office.

Q. You don't think it was at the office. Where do you think it was?

A. He brought it up to my office.

Q. Whereabouts?

A. At the time it was in the Security Building.

Q. Do you remember, Mr. Whitsett, when you first started to work on this case in '49 you went to Dr. Lutfy's office from time to time to work on his books and records, do you remember that?

A. I was there twice.

Q. Do you recall that you asked Dr. Lutfy where you could work, if he had a place where you could work there at the office?

A. Yes.

Q. And he told you that he did and took you into a room in which there was a rather large table, something on the order of one of these tables except perhaps longer?

A. Yes, it almost was the length of the end of the room.

Q. A table about three feet or so wide and about twelve feet long, almost the length of the room?

A. Probably, yes, sir.

Q. Do you remember in order to make a place for you to do [308] your work there that he had to move some photographic equipment that he had there on that table?

A. He could have moved something or cleared

(Testimony of Howard H. Whitsett.)

away something. I don't remember it was actually photographic equipment or just what it was. I am not a photographic fan and don't recognize all of the things of that nature.

Q. You mean to say now you might have seen photographic equipment but not being advised of those matters you might not have recognized it when you saw it, is that what you mean to say?

A. That is very possible.

Q. I would like to ask you specifically if you do not remember that among the photographic equipment on that table where he took you to do this work was also an enlarging device or enlarger, do you remember that?

A. If I saw it I probably connected it with his x-ray.

Q. Do you recollect there were trays there, some three trays designed to hold solution that were moved aside so that you could sit at that table and have room to do your work?

A. No, I wouldn't remember any specific trays.

Q. Do you remember seeing there a device for the printing of photographs?

A. Not there. He showed me his room where, as far as the x-ray room and all that, there could have been all that stuff in there, too.

Q. I am not referring to the x-ray equipment. I am [309] referring to the photographic other than x-ray. You don't recall seeing any equipment for printing of photographs?

A. I wouldn't probably recognize it if I saw it.

(Testimony of Howard H. Whitsett.)

Q. I see. Then you can't be at all sure then, can you, Mr. Whitsett, in your statement that you made to the Jury and your testimony in chief that you saw at no time any photographic equipment in Dr. Lutfy's office?

A. The only time I remembered seeing any was when he brought the equipment to show some pictures at the office.

Q. Then you wish to qualify your testimony at this time by saying you might have seen something in the office, but you possibly didn't recognize it for what it was?

A. I didn't go over everything in the office of that nature.

Q. I understood you went over everything from stem to stern while you were there.

A. I am afraid that is a little bit wrong.

Q. I am sure you will remember this, that Dr. Lutfy on one or more occasions showed you quite a number of slides and photographs of a clinical nature which he had, pictures he had made of various conditions that had been presented to him by his patients in the course of his professional practice.

A. Yes, he came up one evening and showed us some of those pictures and pictures of his family.

Q. You recognize, do you not, you are aware that many [310] physicians and surgeons make a photographic record of virtually every case that goes through the office of any consequence?

A. No, I am not aware of that.

Q. You are not aware of that?

A. No, sir.

(Testimony of Howard H. Whitsett.)

Q. By that you mean you don't know whether that is true or not?

A. Of the number of doctors I have ever examined has this been a practice.

Mr. Roylston: I couldn't hear the answer.

The Witness: I said of any of the doctors whose returns I have examined was that a practice.

Q. (By Mr. Parker) Have you ever examined a situation of a surgeon doing any plastic surgery?

Mr. Roylston: I object unless it is shown the doctor is a plastic surgeon.

Mr. Parker: Very well, I will withdraw that question.

Q. (By Mr. Parker): To progress to one other subject. Do you recall—of course you know Mr. Howard Linsenmeyer, do you not?

A. I saw him in Court.

Q. That wasn't the first time you had seen him, was it? A. Yes, sir.

Q. That was the first time you had seen him?

A. That was the first time I had seen him, yes, sir. [311]

Q. I may be under a misimpression but I was under the impression you and Mr. Tucker, oh, some three or four months ago had gone out to the Maricopa Packing Company which he operates and talked with Mr. Howard Linsenmeyer there.

A. I wasn't present.

Q. You were not present? A. No.

Q. And it is your testimony you had never seen him before? A. No, sir.

(Testimony of Howard H. Whitsett.)

Q. Now, with regard to these gifts from Mrs. Linsenmeyer you did make some investigation among the members of the Linsenmeyer family pertaining to that?

A. Yes and we searched the records of the Collector of Internal Revenue for gifts filed and recorded.

Q. Now, of course unless you made a gift of more than \$3,000 in any one year there wouldn't be any gift file on her, would there?

A. I believe that is the exemption.

In other words, any gift under \$3,000—I mean if the total of gifts in any one calendar year is not in excess of \$3,000 it is exempt and your bureau would not be concerned with such gifts from a tax point of view?

A. They are not taxable, I believe. I am not a gift tax agent so I don't keep up with that too well.

Q. You did contact Mr. Otto Linsenmeyer, the attorney? [312]

A. Yes, I met Mr. Otto Linsenmeyer.

Q. And Mr. Otto Linsenmeyer told you his mother had made a practice of making gifts of articles of clothing and money to various members of the family?

A. He mentioned occasionally they received gifts. There wasn't very much conversation on that score from him.

Q. How many other members of the Linsenmeyer family did you contact with respect to that subject?

(Testimony of Howard H. Whitsett.)

A. Mr. Otto Linsenmeyer is the only one I have ever met before.

Q. You did not meet or discuss this matter with Mrs. Lutfy?

A. No. I believe the only time I saw Mrs. Lutfy, I am not too sure it was Mrs. Lutfy, or I wasn't at that time, I believe was the second time I was out there. Mrs. Lutfy was taking care of the office for a brief period and stepped into the office and spoke to me and I presumed it was Mrs. Lutfy but I didn't receive an introduction and wasn't positive it was she. I wouldn't have known her to identify her on the street.

Q. Now, referring once again to Exhibit 33, the so-called net worth statement, can you state of your own positive knowledge that the assets and liabilities listed here as of 12/31/45 constitute all of the assets and liabilities of whatsoever kind, character and nature and wheresoever situated, which [313] belonged to the defendant Dr. Lutfy at that date?

A. We made an exhaustive search and these were all we were able to find.

Q. Those were all you were able to find. But you cannot state they were all that existed?

A. I think that would be impossible for anyone but the doctor.

Mr. Parker: That is all.

(Testimony of Howard H. Whitsett.)

Redirect Examination

By Mr. Roylston:

Mr. Roylston: Just a few questions. This Government's Exhibit which I had marked, I believe the last one that was marked for identification, Government's Exhibit 36, I will offer it at this time.

Mr. Parker: May I ask Mr. Whitsett one question about this on the nature of voir dire question?

Q. (By Mr. Parker): Referring to this Exhibit 36, Mr. Whitsett, on the second page of the Exhibit I notice a "O.K." there. Did you ascertain from Dr. Lutfy or any other manner who put that "O.K." on that Exhibit?

A. No, sir, it wasn't mine.

Q. Did he not tell you that he had submitted this to the accountant who prepared this tax return for that year and that the "O.K." had been placed there by his accountant?

A. No, sir, I don't remember that statement.

Q. Would you say it had not been made to you or you [314] simply do not recall it?

A. I don't believe it was made to me.

Mr. Parker: Very well.

The Court: This is the item you offered earlier and Mr. Parker wanted to examine.

Mr. Roylston: Check the original, yes, sir.

The Court: It may be **admitted**.

(Government's Exhibit 36 marked in evidence.)

(Testimony of Howard H. Whitsett.)

Q. (By Mr. Royston): Now, Mr. Whitsett, referring to this Government's Exhibit 36, would you state just where you obtained the original of this document? A. From the doctor.

Q. And what particular book——

Mr. Parker: That has been asked and answered, your Honor.

The Court: You had him identify it when you first produced it.

Mr. Royston: I had forgotten.

Q. (By Mr. Royston): This document you stated came from the doctor's log book, did you have discussion concerning these particular entries which read under July 8th: "Lost to Les Madison, \$548." And July 30th, "Tiny lost \$200, total \$748." Did you have any discussion with Dr. Lutfy concerning those two entries?

A. I questioned him about that and he explained it was a [315] gambling loss playing poker. And I told him that was not a deductible item.

Q. Referring to the second page of the document then—this also comes from the doctor's records?

A. Yes. This was a listing of the entertainment expense sheet for the year 1946.

Q. And was that \$700—— A. \$802.70.

Q. Was this \$748 item included on the tax return as entertainment expenses?

A. The total was included on the '46 tax return as the entertainment expense for that year.

Q. The total? A. Yes, sir.

Q. Referring to some of your testimony during

(Testimony of Howard H. Whitsett.)

cross-examination in reply to a question which Mr. Parker asked concerning this Cable Trust Company real estate transaction, when Mr. Parker asked you why you could examine Dr. Lutfy's income tax returns which reflected that transaction as a long-term capital gain and why you could not inspect the Cable Trust Company's returns, I believe your answer was there was a different basis for the two, is that correct?

A. There was a different basis on the Statute of Limitations.

Q. Now, will you explain just what you meant they were on [316] a different basis?

Mr. Parker: Now, I object to his going into a discussion of the Statute of Limitations. And I think I have in mind what the answer might consist of if he is allowed to ramble freely and it would be prejudicial and quite improper. I didn't press the point——

The Court: I think it is an appropriate stopping place if we are not going to get into some collateral matter.

Mr. Royston: It might get into some prejudicial matters.

The Court: I don't say necessarily prejudicial, Mr. Royston, but collateral or extraneous. I am not ruling on the basis it might be prejudicial because I don't know but I think you might be getting off into some extraneous matters.

Mr. Royston: I will withdraw it.

Q. (By Mr. Royston): With reference to that sale in this Cable Trust Company transfer, the sale

(Testimony of Howard H. Whitsett.)

which you stated you computed as a short-term gain rather than a long term. A. Yes.

Q. Would you state just what particular date you used in deciding that the sale was a short-term rather than long-term capital gain?

A. I used the date of August 10th, the first action by the minor after he became of age in regard to his sale of the property. [317]

Q. And what was that first action after the minor became of age?

A. He signed the deed, I believe. And the closing I used the date, the last date when everything was closed and paid couldn't have been possibly any later than that; I believe that was January 22nd, which left a period of several weeks' variance lacking the six months' period.

Q. Now, with reference to the transaction which was the other real estate transaction which you computed as a short-term capital gain rather than long-term capital gain, I will refer to it as the Lantin transaction; just what was the specific date you used in determining the sale was actually completed?

A. I used the date that the buyer paid in his final payment because the title and trust company does not require the payment of the balance until the deal has been closed sufficiently to know whether or not the title would be clear. And at that time neither party could go back on their agreement and at that time the title passed.

Mr. Parker: If your Honor please, I am a little bit aroused at a layman making such sweeping state-

(Testimony of Howard H. Whitsett.)

ments of his conclusions of law. There certainly has been no qualifications shown by this witness to venture expert opinions on such a strictly and highly technical question of law, as distinguished from accounting, as that. I move this last answer, at [318] least that last portion of it, be stricken and the Jury instructed to disregard it. There is no showing this gentleman has had any legal training or possesses a license to practice law.

Mr. Royston: We are not claiming any such thing as that anyhow. All I am trying to show is what date this witness used in his computation and why he used that particular date.

Mr. Parker: Of course that was the original question and he had answered it before he got to this and he was simply, as I see it, giving an unresponsive part of the answer by way of justification of the date which he had used. But when he said he used the date when the buyer made the final payment to the title company he had given a complete answer to the question which had been asked of him. Then he went ahead to venture the conclusion of law and that is the portion I seek to have stricken from the record and the Jury asked to disregard it.

Mr. Royston: He may have answered a little further, but that was just an answer to my next question which would be as to why he used that specific date.

The Court: It may stand. I think the Jury understands the witness is explaining why and his reasons, only insofar as he has stated a legal opinion.

(Testimony of Howard H. Whitsett.)

they are the opinion of a layman. He is not testifying as a lawyer. He is merely explaining it to show how he did arrive at it. [319]

Q. (By Mr. Roylston): With reference to this matter of the stolen car did you deduct any expenses which the doctor claimed in connection with that or did you disallow any part of that other than the approximately \$1300 which were spent on investigation, 'phone calls?

A. On a net worth statement you don't disallow anything. The only way it affects the net worth is what you add back in as personal expenses, add to the increase in net worth. And the cost of the car, \$5400, was all that was added in as an expense or expenditure.

The Court: Now, will you tell me what you mean by that. Counsel asked you if you had taken away from it anything except the \$1300 and you have answered the question. Have you taken the \$5400 and added it in as a non-deductible expenditure?

The Witness: Yes, sir, as a personal expenditure for that year.

Q. (By the Court): In other words then the \$5400 does go to increase your unreported net income as it appears in this schedule?

A. That added to the increase in net worth.

Q. That is right? A. Yes, sir.

Q. It is reflected in what you have styled unreported net income? [320] A. Yes, the \$5400 is.

Q. (By Mr. Roylston): Then on an item like

(Testimony of Howard H. Whitsett.)

this when is the taxpayer allowed to claim that as a deduction, that particular expense?

A. When that has finally been settled and he knows just how much the loss suffered actually was.

Q. So that would have been in 1949 or some date past the period we are concerned with?

A. '50 or '51 somewhere.

Q. All right. There were quite a few questions asked by Mr. Parker concerning amounts of expenditures which the Government originally stated and the fact that now those amounts are decreased. I will ask you in the matter of personal expenditures if this decrease from what the Government originally stated own to what it is presently stated, if that is in favor of or against the taxpayer?

Mr. Parker: If your Honor please, before that is answered I want to challenge the form of the question. He refers to my questions of certain figures, certain original figures which were substantially less than the figures which Mr. Whitsett now comes forth with in his Exhibit 34. And the question assumes matters not in evidence, although there was some evidence that he had at some time had another set of figures which had been greater; but it seems to me that the form of the question may be contrary to the evidence. [321]

The Court: It is leading anyway. I will ask counsel to reframe it on that basis.

Mr. Royston: Maybe I misunderstood Mr. Parker's questions this morning and I don't have

(Testimony of Howard H. Whitsett.)

anything here that I know of to look to see what those amounts are.

Mr. Parker: I do. I have the Government's original proposed stipulation on it. I will be glad to show you the Government's figures right here.

Mr. Roylston: All right, the Government list, \$5,222.63 and now you state there was \$4,795—

Mr. Parker: No.

Mr. Roylston: Mr. Parker, I am reading off this thing you handed me.

Mr. Parker: For 1948 the Government's original figures proposed \$5,222.63.

Mr. Roylston: That is just like I read it. Let's read on across here.

Mr. Parker: Those are my notes.

Mr. Roylston: That is the question you asked him this morning.

Mr. Parker: No, sir. I asked him no questions based on these penciled notes of mine. I asked only about the Government's figures which are in typing here.

Mr. Roylston: Let me see that stipulation, please.

Q. (By Mr. Roylston): The figure, the 1948 figure, the [322] original stipulation which Mr. Parker discussed with Mr. Cass or somebody he was talking about this morning, if that showed \$5,222.63 and now your computation on Government's Exhibit 34, I believe is the number, the one we referred to as page 4, is \$5,560.61, what accounts for the difference in those two figures?

(Testimony of Howard H. Whitsett.)

A. I believe on that original stipulation that the figures were made up from the amounts paid that the Government at that time had witnesses to prove. Since then Mr. Parker and yourself have come to agreement on and stipulated to items, a great many more than were included in that figure or different ones.

Q. And those were matters which are covered in the checks which were, the cancelled checks which were in the doctor's records, is that right?

A. Yes, sir.

Q. Now, in connection with this photographic equipment that the doctor claimed as clinical photograph equipment on his returns, just how were those matters listed, those expenses for photographic equipment?

A. All the checks that were written were deducted as expenses. And on his '48 return he capitalized a round figure of \$2,000 and claimed depreciation on that.

Q. So these particular items were both carried as expenses and also depreciated, is that [323] correct?

A. That is correct.

Q. And what does that result in?

A. A double deduction on the return.

Q. Now, with reference to this matter which Mr. Parker brought out on his cross-examination in connection with this bank account you discovered in late 1953, these two accounts, and Mr. Parker's question concerning whether you were able to ascertain if Mrs. Lutfy in 1945 sold a diamond ring for

(Testimony of Howard H. Whitsett.)

\$3500; I will ask you to examine Government's Exhibit 7 and state whether or not the sale of a diamond ring for \$3500 is reflected on Bertha Lutfy's return for that year.

Mr. Parker: Your Honor, I submit it wouldn't need to be unless it was a capital gain that was taxable.

The Court: Isn't that correct, Mr. Roylston? Would you put an item like that in the return?

Mr. Roylston: Yes, I think it would have to be reflected in the return.

Mr. Parker: No, not at all, not unless it was a taxable gain. That is elementary.

Mr. Roylston: It might be elementary, but I don't exactly agree with it. It may be that some of us think below the elementary level, but it is my understanding any sale of property such as that has to be reflected on the return.

The Court: I will settle that by ruling it doesn't have to be, to end the argument. [324]

Mr. Roylston: All right, sir.

Q. (By Mr. Roylston): There were questions asked by Mr. Parker as to whether in examining these cancelled checks of Dr. Lutfy whether you could tell that the purchase of the specific item was of a personal nature or of a business nature. Now, I am going to ask you if you had any trouble telling a dining room set should not have been listed as an automobile expense?

A. When I found it was a dining room table I had no trouble.

(Testimony of Howard H. Whitsett.)

Q. You had no trouble telling a Marietta dining set was not an automobile expense, is that correct?

A. That is right.

Q. Did you have any trouble telling whether a French Provincial table was drugs and supplies?

A. No, sir.

Q. Did you have any trouble telling whether these compotes or candy dishes were drugs and supplies?

A. No, sir.

Mr. Royston: That is all.

Recross-Examination

By Mr. Parker:

Q. Mr. Whitsett, did I understand you to say that the reason the Government's proposed figures for the Lutfys' living expenses paid by check were originally lower than the figures which you have set forth in this tax computation being [325] Exhibit 34 was that since that time we have stipulated on more things which were not in contemplation for stipulation at that time?

A. I believe I changed that to "different" at the end of the question. Maybe you didn't hear me, I am sorry. But there were stipulations, I don't have the figures or notes to know whether there were more, but there were a great many stipulated expenses and they were different than the ones I understand are made up in that total that you have quoted from.

Q. I think you are quite incorrect. I have the Government's proposals here and at the proper

(Testimony of Howard H. Whitsett.)

time I will offer them. I would like to ask you this. Are you not aware that at the time this lower figure for these living expenses was proposed by the Government that we then had in contemplation 142 stipulations, distinct stipulations of fact, which is substantially more stipulations than have been entered into here in this trial?

A. That total was not a total of all of those stipulations of expenditures on that first stipulation.

Q. They weren't all expenditures, no, but there were more stipulations as to expenditures contained in that, are you not aware of that fact, than there were in the stipulations contained here?

A. I was only talking about that total and these stipulations. [326]

Q. Frankly, I don't know what you are talking about, Mr. Whitsett, but I think I know what I am talking about. I think so, maybe not. That is all.

Redirect Examination

By Mr. Royston:

Q. The reason for the difference could have been was the Government didn't see fit to bring a witness here to testify to a 15 or \$20 item which has now been stipulated to, is that correct?

A. That is right.

Mr. Parker: If Your Honor please——

Mr. Royston: I was trying to straighten this thing out.

(Testimony of Howard H. Whitsett.)

The Court: I haven't heard Mr. Parker's objection yet.

Mr. Roylston: All right, sir.

Mr. Parker: In the first place it is a leading and suggestive question.

The Court: The objection will be sustained and the Jury will disregard the answer to it.

Mr. Roylston: No further questions.

Mr. Parker: No further questions, Your Honor.

(Government's Exhibit 37 marked for identification.)

Mr. Roylston: If it please the Court, at this time I will offer Government's Exhibit 37 for identification into evidence. It is a certified copy of assessments and payments. It is signed by the Chief of Collection Division of Internal [327] Revenue.

Mr. Parker: If Your Honor please, for the reasons stated in the objection the questions designed to the same end, we now object to that for the reason that it proves nothing with respect to the factual issue here. In other words, the factual issue here could be resolved as either contended by the defendant or the Government and still it would have not been influenced any way by that. In other words, that instrument could be as it is and the issue of fact either way. Therefore it has no probative value and to my way of thinking its tendency is to unfairly prejudice the showing which the defendant expects to make. Furthermore, it is an

anticipation of a defense which has not yet been put in by the defendant.

The Court: The objection will be sustained.

Mr. Royston: If I might be heard on one point. It is in reference to a matter brought out on cross-examination of the last witness by Mr. Parker, it is in reference to that matter.

The Court: It may be offered if it becomes pertinent. I doubt that it is now.

Mr. Royston: I don't want to belabor it. I want the record to show the Government also contends it is relevant to the point of cash on hand at the beginning point of this period, that this is in relation to that item, too. [328]

* * *

Mr. Parker: Your Honor, at this time there are some motions which will take some time to dispose of.

The Court: Ladies and Gentlemen, you will be excused at this time until Tuesday at 10:00 o'clock. Bear in mind during the recess the admonition that I have given you. Especially don't read any newspapers or news media about the case. I think you all appreciate that your verdict in the case must be based on the evidence that you get here and that is wholly and solely what you would base it on and not on any extraneous matter. I will ask you to bear that admonition in mind, and we will recess until 10:00 o'clock on Tuesday.

(The Jury retires from the courtroom.)

Mr. Parker: If it please the Court, the defendant moves the Court for a directed or instructed verdict of not guilty and for judgment of acquittal in this case upon a number of grounds which I trust I shall be able to enumerate with sufficient completeness to make clear the position which we take. In the first place, the general ground that the evidence in the case is insufficient to establish a *prima facie* case or to take the case to the Jury. Specifically and with more particularity we take the position and it is a part of the basis of our motion that this is not a case for the application of the net worth theory.

(Argument presented by counsel for the defendant.) [329]

Mr. Parker: Now, with the net worth theory out, if the Court should determine this is not a net worth case and the Government's case as far as it is could have been predicated on specific evidence, and I think that is clear, because actually when we get down to it the evidence taken in its light most favorable to the Government here simply amounts to the fact that there is a disagreement between the Internal Revenue Service and the defendant and accountants, whoever they were, that prepared the defendant's returns as to what deductions were allowable and what should have been taken and what should not have been taken, and the way I think it is that ninety per cent of the so-called unreported net income which, in fact, as Mr. Whitset admitted is not unreported income at all, it is reported but

it doesn't appear on that sum as net income for the reason there has been a difference in the manner in which the deductions have been applied. That the difference between this so-called unreported net income is accounted for, ninety per cent at least by the question of the different conviction as to the deductions to be taken. That it is basically, and I think a case where there is no occasion in practical operations or in law for resorting to the net worth theory. However, they have resorted to the net worth theory and the predicate upon which this Exhibit 34 is founded is the net worth theory of gross income and consequently if it should be decided here that the net worth theory is [330] not applicable here and should not be used then the Government has not made a case because the Government's very predicate of their case here, as is clear from these two Exhibits is a net worth theory and if that theory is wrong and shouldn't have been applied to this case then the Government's case is gone.

Now, I wish to assign another ground here and that is, even assuming that the net worth theory is applicable, which I don't think it is, I do not believe that the proof is sufficient, because the Courts have repeatedly said that in the application of the net worth theory there is no validity to it unless it encompasses all of the defendant's assets, particularly on the starting date.

(Further argument by counsel for the defendant.)

Mr. Parker: If Your Honor please, I want to further predicate this motion upon the proposition that the Government's evidence has not made out a prima facie case with respect to intent; that there is no substantial evidence from which the Jury could logically or reasonably infer the type of wilful, deliberate, criminal intent which must be proved beyond a reasonable doubt as any other fact or element in the case. And that for that reason the evidence seems to us to be sadly deficient. We, I suppose, possibly after a ruling on this motion might have some alternative motion we would want to present, but would probably be premature at this time. And I [331] think in substance, perhaps sketchily, I have stated the main basis of the motion at this stage of the case.

(Argument presented by counsel for the Government.)

The Court: I will reserve ruling on the motion. I want to read these cases that have been cited and also examine the 29, 30 and 31, I believe they are the Exhibits. And I will advise counsel at 9:30 on Tuesday. Will you have at that time, Mr. Royston, the information I asked you for this morning?

Mr. Royston: Yes, Your Honor.

The Court: We won't reconvene at 9:30, we will reconvene at 10:00, but I can advise counsel at that time and then make the ruling at 10:00.

Mr. Parker: If Your Honor please, in order to perhaps keep things better together in a parcel I would like to add a further motion which I hope

the Court will not construe as an expression of any lack of confidence I have in the motion formerly made; and that is in the event the Court should decide there is sufficient evidence in this case to take the matter to the Jury then I do move in such event that the Court strike from the evidence all of the evidence relating to net worth and instruct the Jury to disregard all of the evidence relating to net worth and the case go to the Jury not as a net worth but rather as an ordinary case which I think it must be if it is a case at all. However, as I say, I don't waive [332] the other motion which I regard perhaps more important than this. But it does occur to me if the Court should decide that the case should go to the Jury the Court might very well consider it not to be a net worth case, and in such event, although it is our position that they have got the net worth in there and it does constitute the basis of their computation of income and therefore the case actually couldn't very well go to the Jury if the net worth part were taken out, so I think probably this alternative motion is a little inconsistent with the situation here because I can't see how it will go to the Jury at all.

The Court: We plead in the alternative, I don't know why we can't move in the alternative.

Mr. Parker: At any rate, I leave the motion on the record.

The Court: Very well. [333]

September 14, 1954—9:30 A.M.

The following took place outside the presence of the jury.

The Court: May the record show that the jury is entirely out of the court room. Defendant is present with his counsel and the United States Attorney is present.

I have considered the defendant's motions over the week end and I have some concern with some points of the case. I am presently denying the motions, both motions, the motion for judgment of acquittal and to proceed without the net worth theory. Both of those motions will be denied. The jury will be here at 10:00 o'clock, so at this time we will recess until 10:00 o'clock.

(Recess.)

(The following took place in open court in the presence of the jury):

Mr. Parker: The first witness for the defense will be Mrs. Bertha A. Lutfy.

BERTHA A. LUTFY

called as a witness herein, having been first duly sworn, testified as follows: [334]

Direct Examination

By Mr. Parker:

Q. Will you state your name, please?

A. Bertha A. Lutfy.

Q. Where do you live at the present time, Mrs. Lutfy?

(Testimony of Bertha A. Lutfy.)

A. 125 East Missouri, Phoenix.

Q. Are you the wife of Louis P. Lutfy?

A. Yes.

Q. How long have you and Dr. Lutfy been married?

A. About sixteen and one-half years.

Q. Do you have a family?

A. Yes. I have three children.

Q. Mrs. Lutfy, your maiden name was what?

A. Bertha Linsenmeyer.

Q. Are you the daughter of, or one of the daughters of Ottelia Linsenmeyer? A. Yes.

Q. Is she alive or dead at the present time?

A. She is dead.

Q. When did she die?

A. January 2, 1950 or the 2nd, 1951.

Q. '50 or '51? A. Yes.

Q. When did your father die, if he is dead?

A. He died in 1934.

Q. Your mother then was a widow from 1934 until the date [335] of her death? A. Yes.

Q. Did she have a number of children, in other words, did you have brothers and sisters?

A. Yes, I was one of eight.

Q. How many are surviving at the present time?

A. Seven.

Q. We heard in this trial from Howard Linsenmeyer. Is he a brother of yours?

A. Yes. He is my younger brother.

Q. You are in what order of age among the girls?

(Testimony of Bertha A. Lutfy.)

A. I am the youngest of the girls.

Q. You are the youngest of the girls. Mrs. Lutfy, are you sometimes known as Tiny Lutfy?

A. Yes.

Q. Is that name commonly used by your friends?

A. Nobody knows my name as Bertha except when I sign a paper.

Q. Do you frequently sign your name as Tiny Lutfy?

A. Not legal papers, but everybody knows me by Tiny.

Q. Have you carried bank accounts in the name of Tiny Lutfy? A. Yes.

Q. How did this nickname—was there any reason for the development of this nickname? [336]

A. I received it at birth because I was a very tiny baby.

Q. You weighed only——

A. About four pounds.

Q. Your family dubbed you Tiny?

A. Tiny. All through school it was Tiny.

Q. That name has stuck with you, has it, throughout the years? A. Yes.

Q. Mrs. Lutfy, during your marriage to Dr. Lutfy, besides rearing these children, have you done any work outside of the home?

A. When my husband was in the Service I was in the real estate business for a short time there.

Q. What did you do in the real estate business?

A. I sold some property.

Q. You were a saleslady?

(Testimony of Bertha A. Lutfy.)

A. That is right. I had a license.

Q. By whom were you employed?

A. Mr. Guy Fisher.

Q. Is he a Phoenix real estate broker?

A. Yes.

Q. Your husband came back from the Service on about what date?

A. About October or maybe the first part of November in 1945. [337]

Q. At that time were you selling real estate?

A. Yes.

Q. Did you continue to sell any real estate after he got back? A. Yes.

Q. With reference to purchases and sales of real estate which have been testified to in this case, did you by reason of your being engaged in the real estate business have anything to do with those purchases and sales? A. Yes.

Q. What, in particular; did you locate the properties? A. That is right.

Q. Now, Mrs. Lutfy, I will direct your attention to the testimony which was given by your brother Howard, respecting certain practices followed by your mother, Mrs. Linsenmeyer, during her widowhood of making gifts to some members of the family, is that true? A. Oh, definitely.

Q. Directing your attention particularly to the years 1946, 1947 and 1948, did you receive from your mother any substantial sums by way of gifts of cash?

A. I would say they were substantial.

(Testimony of Bertha A. Lutfy.)

Q. Of course, I assume you have no record of them and kept none at the time?

A. No. [338]

Q. When were these gifts ordinarily forthcoming? Was there any special time or were they made at random dates?

A. Always at birthdays, Christmas and even Easter. She always gave something at Easter, too.

Q. Did she give other things besides cash?

A. Oh, yes.

Q. What did those things consist of?

A. Well, they would be anything from a fine lace tablecloth to a blanket, gold bracelet, things like that. Could be anything.

Q. Personal items of that sort?

A. That is right.

Q. During the three years that I have mentioned, what would you say, what amounts would you say the largest single gift of money was you received from your mother?

A. The largest single gift I ever received was \$300.

Q. Do you remember which of these years, '46, '47 or '48 you got that particular gift?

A. It was probably, I would say in '46.

Q. Now, Mrs. Lutfy, can you tell the Court and jury your best estimate of what these gifts would amount to averaged out over this three-year period, at least a minimum figure which they would amount to over this three-year period, per year?

(Testimony of Bertha A. Lutfy.)

A. I would say it was probably in the neighborhood of \$500. [339]

Q. Per year?

A. Adding what I would get at Christmas time——

Q. I am talking about the cash.

A. Yes, that is right.

Q. The cash gifts would amount to, you think, an average of \$500 a year?

A. That is right.

Q. What did you do with the cash gifts which you received from your mother with respect to the uses made of them?

A. They just seemed to go and I didn't seem to——

Q. What I mean is, were they used for general household purposes such as the purchase of foods, and so forth?

A. That is right. I didn't have anything to show for it.

Q. You didn't put these gifts away in a mattress or anything of that sort? A. No.

Q. Now, Mrs. Lutfy, was there anything characteristic about your mother with respect to gifts as between the various children. That isn't a very intelligible question. I will rephrase it. Did your mother disclose to all you children what amount or what she was giving at the time to other children in the family, or what was her attitude in that respect?

A. She was very odd about that. She never

(Testimony of Bertha A. Lutfy.)

wanted the next one to know what she gave to one because she never wanted [340] one to think she was giving one more than the other. Even when she would give me a gift of bulk of any size she would give it to me when I would arrive and insist I take it to my car and come back and spend the afternoon. She didn't want anybody to see what she was giving me.

Q. By that I assume you mean she didn't want to create any friction? A. Hurt feelings.

Q. Among the children over the prospects that one may have received more than the other?

A. That is right.

Q. Did your mother during her lifetime also from time to time loan money to various of you children? A. Very definitely.

Q. Do you know of her having loaned money to some of your brothers?

A. Yes. Let me see, the year even I could tell you. She has loaned amounts I know——

Q. Mrs. Lutfy, I just asked you if she did that? A. Yes.

Q. I wasn't probing specifically for the date. Now, Mrs. Lutfy, at the time of your mother's death, did she leave a substantial amount of cash and securities? A. Yes.

Q. May this exhibit be marked for identification? [341]

(Defendant's Exhibit C marked for identification.)

(Testimony of Bertha A. Lutfy.)

The Clerk: Defendant's C for identification.

Q. I show you a certified copy of an inventory and appraisement. Is that the inventory and appraisement made in the State Court by an appraiser appointed by that Court of your mother's estate?

A. Yes.

Q. The total amount of that estate as appraised by those appraisers was what amount?

Mr. Royston: I am going to object to this until it is offered.

Mr. Parker: I beg your pardon. I failed to offer these in evidence and I do so at this time.

Mr. Royston: I am going to object to this on the grounds it is in the year '51 and the only dates we are concerned with are '46, '47 and '48 and prior thereto.

Mr. Parker: It represents an estate hardly that would be accumulated in a short period of time, especially in view of the fact that——

The Court: It may be admitted as defendant's Exhibit C in evidence.

Mr. Parker: Ladies and gentlemen of the jury, I won't burden you by reading all of this exhibit. This is an inventory and appraisal made in the Superior Court of Maricopa County in the estate of Ottelia Linsenmeyer. The document is [342] dated March 31, 1951. The appraisers are Robert Long, Victor Steinegger and another name which I regret I am not able to pronounce, Albert Muckenthaler. As to the category of personal property, the inventory and appraisement reads as follows:

(Testimony of Bertha A. Lutfy.)

United States Bonds, \$11,595.50; 382½ shares of the capital stock of Maricopa Packing Company of the probable value of \$76,500; 3086 shares of the capital stock of Tovrea Land & Cattle Company, \$154,300; cash on deposit in a checking account in the First National Bank of Arizona, Phoenix, First Phoenix Branch, \$31,954.47; cash on deposit in a savings account in the First National Bank of Arizona, Phoenix, First Phoenix Branch, \$24,960.44. Then there are other items of various things of personal property. The total of the estate as shown upon this appraisalment and inventory is \$576,016.30 (Defendant's Exhibit C shows \$570,616.30).

Q. While we are on the subject, Mrs. Lutfy, I will direct your attention to the month of September, 1947, and the purchase of an automobile. Do you recall that? A. Yes.

Q. I would like to have this exhibit marked, please.

(Defendant's Exhibit D marked for identification.)

The Clerk: Defendant's Exhibit D for identification.

Q. Also this one.

(Defendant's Exhibit E marked for identification.) [343]

The Clerk: Defendant's Exhibit E for identification.

(Testimony of Bertha A. Lutfy.)

Q. Mrs. Lutfy, I show you defendant's Exhibit D for identification and ask you if you have seen that before? A. Yes.

Q. What is that?

A. It is a check made, Western Union Money Order, made payable to myself for \$5600.

Q. Did you receive that money order?

A. Yes.

Q. Who sent it, if you know?

A. My husband, Dr. Lutfy.

Q. What did you do with that money?

A. I bought a car.

Q. What kind of a car did you buy?

A. Lincoln Continental Convertible.

Mr. Parker: We offer photostatic copy of the money order.

Mr. Royston: No objection.

The Court: It may be admitted.

Mr. Parker: Ladies and gentlemen, I will hand you this Western Union Money Order, dated September 19, 1947, Mrs. Tiny Lutfy, \$5600, sent from Phoenix, September 18, 1947.

Q. Now, Mrs. Lutfy, do you know whether or not at the time your husband had \$5600, that is just prior to the sending of this money order? [344]

A. I don't think so.

Q. Do you know where any of this \$5600 came from?

A. He had some money and he got some from Mr. Basha.

(Testimony of Bertha A. Lutfy.)

Q. Did he borrow any money or get any money from your mother? A. Yes.

Q. To make up this sum? A. Yes.

Q. How much, do you know approximately?

A. I think around \$3200.

Q. Around \$3200, that is the best of your present recollection. Was that money ever repaid to your mother? A. No. It never was.

Q. While we are on the subject of this automobile, what happened to this automobile?

A. It was stolen.

Q. It was stolen. Did you and your husband make a claim to the insurance company for your loss on this car? A. Yes.

Q. Do you recall, by the way, about when it was stolen?

A. Just a couple of months, I believe, after we had it, probably in November.

Q. Now I show you defendant's Exhibit E for identification and ask you to take your time and look that letter over and when you have, tell me what it is. It is addressed to you [345] and also to your husband, is it not? A. That is right.

Q. It is a letter from the attorneys for the insurance company?

A. That is right, well, it just said that the policy was void.

Q. I see. Did you receive this letter in the regular course of the mails on or about the date it bears? A. Yes.

Mr. Royston: No objection, Your Honor.

The Court: It may be admitted.

(Testimony of Bertha A. Lutfy.)

Mr. Parker: Ladies and gentlemen, this is defendant's Exhibit E in evidence and I will not read it entirely. It is addressed to Dr. Louis P. and Mrs. Bertha A. Lutfy, 301 West McDowell Road, Phoenix, Arizona, dated February 4, 1948. "Dear Sir and Madam:—" By the way, this is on the letterhead of the firm of Phoenix Attorneys, Kramer, Morrison, Roche and Perry. "The London Assurance has referred to this office for attention the matter of your asserted claim under Automobile Policy Number 148323. The Company has made a very thorough investigation into the matter of such claim and is of the definite opinion that it cannot recognize the same. Therefore, if you feel that you do have a claim under such policy, you are expected to comply with all the conditions, stipulations and requirements therein or thereby imposed upon [346] you."

Q. The company, when you lost this automobile that was stolen at the end of '47, as I understand it, the insurance company refused to pay the claim for the loss of the car?

A. That is right.

Q. And did you thereafter, you and your husband, sue them?

A. Yes.

Q. You eventually took the matter, did you, to a high court on appeal?

A. Yes.

Q. Sometime later, do you remember how much later it was, or how many years later it was, you finally prevailed and collected some of the money?

A. Several years later.

Q. Several years later. Now, Mrs. Lutfy, do you

(Testimony of Bertha A. Lutfy.)

know whether or not on December 31, 1945, your husband had in effect any life insurance policies?

A. Yes.

Q. Do you know approximately the face value or face amount of such policies?

A. At that time I believe he had around \$45,000.

Q. Do you know whether or not any of those policies had been in force for some time?

A. Oh, yes. [347]

Q. Do you know whether any of those policies had been in force as far back as the date of your marriage to Dr. Lutfy?

A. Yes.

Q. By the way, what was the year of your marriage?

A. 1938.

Q. At that time was he practicing medicine?

A. Yes.

Q. Where was he practicing medicine?

A. In the Professional Building in Phoenix.

Q. Mrs. Lutfy, directing your attention to another matter, I will ask you whether or not your husband, Dr. Lutfy, has ever had any training in law?

A. No.

Q. Or legal matters?

A. No.

Q. Has he ever had any training or experience in the field of accounting?

A. No.

Q. Has he ever, to your knowledge, made any claim of having any particular knowledge of income tax matters or income tax returns?

A. No.

Q. Now, Mrs. Lutfy, at the time of your mar-

(Testimony of Bertha A. Lutfy.)

riage to Dr. Lutfy in 1938, where did you live, where did you establish a home?

A. We lived in a little apartment at 1317 North Central [348] in Phoenix.

Q. Do you know about how long you lived there? A. Over a year.

Q. Now, without going into minute details, as I recall the evidence shows here that in 1946 and 7, at least part of '48, you were residing in a house at 1125 Granada? A. 1305 East Granada.

Q. I beg your pardon, 1305 East Granada?

A. Yes.

Q. Will you describe that habitation in a general way at least?

A. It was a very small two-bedroom house. It was furnished, if you call it furniture, it was very modest.

Q. How was it furnished? Did you have new furniture? A. Oh, no.

Q. Where had you gotten the furniture? Had you gotten it all at one time or how had you acquired it? A. That came with the house.

Q. You bought the house furnished?

A. Yes.

Q. Was that a new house at the time or an old one? A. No. It was an older house.

Q. Then in '48, sometime in '48, am I correct in assuming that you and Dr. Lutfy and the family moved? A. Yes. [349]

Q. Where did you go to?

A. 714 West Maryland.

(Testimony of Bertha A. Lutfy.)

Q. Is that the property that has been described here as the apartment property?

A. Triplex.

Q. Now, describe that a little bit for us, just briefly.

A. It was just one long building with three doors, three back doors, concrete block. It wasn't even plastered, painted, it had cement floors with asphalt tile all over.

Q. At the time you moved into the triplex how many members were there in your family?

A. Three children.

Q. Three children and you and Dr. Lutfy?

A. Yes.

Q. Were you doing your own work at that time or did you have help?

A. I don't know if I had any help moving that time or not.

Q. How much of this triplex did you and your family occupy?

A. We used two units.

Q. Do you remember what time in 1948 you moved in there, approximately or roughly?

A. It was right after school was out, about the first part of June. [350]

Q. You lived there the balance of 1948 and on into 1949?

A. Yes.

Q. Now, did you during the period of June 1, '48, to the end of that year offer the third apartment for rent?

A. We offered the apartment for rent.

Q. Did you yourself take care of that matter?

(Testimony of Bertha A. Lutfy.)

A. Yes. I put an ad in the paper.

Q. You put an ad in the paper? A. Yes.

Q. Did you show the apartment to people?

A. Yes.

Q. When they came to see it? A. Yes.

Q. Did you keep it vacant and available for renting? A. Yes.

Q. And was it rented or were you successful in renting it? A. No.

Q. During that year? A. No.

Q. Later on did you make some other uses of it, that is, in '49 or '50 with which we are not concerned in this case? A. Yes.

Q. But during '48 it was vacant and being offered for rent? A. Yes. [351]

Q. Now, Mrs. Lutfy, can you tell the Court very briefly the kind of life you and your family led with respect to your standards of living and that sort of thing, just very briefly, or would you rather I ask you some specific questions about it?

A. Well, I wouldn't know where to begin. I mean, there just wasn't much to say.

Q. Were you folks at that time making a practice of going out to night clubs and that sort of thing?

A. Rarely. Rarely did we go to a night club. Our entertainment was a movie or visiting family members or friends, or friends visiting us.

Q. With respect to your food, was there anything unusual about the way you purchased food for the family?

(Testimony of Bertha A. Lutfy.)

A. Yes. I was fortunate there. I bought wholesale.

Q. You bought wholesale, and how were you able to buy wholesale? A. Through relatives.

Q. To whom do you refer in particular?

A. Bashas.

Q. Basha Brothers? A. Yes.

Q. Who are they with respect to what business?

A. They have a chain of grocery stores in the valley under the name of Bashas. [352]

Q. And you were able to and did buy most of your groceries there wholesale? A. Yes.

Q. With respect to the medical and dental care of the children, was there anything unusual about that?

A. Doctors' families never pay for medical services.

Q. You did not have to pay pediatricians and that sort of thing when the children were little?

A. No.

Q. Did you have to pay for the deliveries of the children? A. No.

Q. With respect to medicines for the family, were you in any respect fortunate there?

A. Yes. Fortunately all we needed for the children were vitamins and tonics. You know any child takes that. They were all given by the companies as samples.

Q. You mean the pharmaceutical firms provided samples and you used those in your family?

A. That is right.

(Testimony of Bertha A. Lutfy.)

Q. Did you give your children cod liver oil and that sort of thing? A. Definitely.

Q. Was that also included among the samples?

A. Certainly. I never bought anything like that.

Q. What about milk? Did you receive any gratuitous milk which was used for the [353] children?

A. I bought very little Carnation Milk. Most of it was all given by the Company, the Carnation Company.

Q. With respect and directing your attention always, of course, to this three-year period, can you tell the Court and Jury what you spent, what amount it took to feed the family, what amount you spent?

A. That, yes. I would say that it never went over eighty-five dollars. It was between seventy-five and eighty-five dollars a month.

Q. Seventy-five and eighty-five dollars a month?

A. Yes.

Q. You were able to do that because of this wholesale and gratuitous samples, and so forth?

A. Yes.

Q. How did the family dress with respect as to whether or not you dressed simply or elaborately?

A. We didn't go out very much, so there wasn't—it wasn't necessary to buy a lot of clothes. My children, they were very fortunate in having aunts and grandmother that kept them fairly well supplied with clothes. Then I would pass them from

(Testimony of Bertha A. Lutfy.)

my oldest boy to my youngest boy. I figured the little one was about three.

Q. You have two boys and a girl? A. Yes.

Q. Having six brothers and sisters and some aunts and [354] cousins and by your grandmother, you refer to their grandmother, you refer to your mother, they were kept fairly well supplied in clothing, is that your testimony? A. Yes.

Q. Now, Mrs. Lutfy, what is the disposition of you and your husband with reference to spending money, and in particular with reference as to whether or not you have practiced thrift in your personal expenditures during that particular time, I am referring to and I am especially interested in 1946, '47, and '48?

A. I pinched. I pinched during those years to buy property.

Q. Did you and your husband, during that time and prior to those years, systematically save money?

A. Oh, my, yes.

Q. Do I gather you saved it to a point of its being almost unpleasant to reflect on it? I will withdraw that question.

Q. There has been some reference to—there has been a witness, I believe, you were in the courtroom, by the name of Julia Sprague? A. Oh, yes.

Q. Do you remember her? A. Oh, yes.

Q. Did she ever work for you and Dr. [355] Lutfy? A. Yes.

Q. Do you remember about when it was, just roughly?

(Testimony of Bertha A. Lutfy.)

A. I think it was about '47. It was on Granada.

Q. Do you know of your own knowledge the purposes for which she was hired and the duties she was engaged to perform?

A. She was there as a sitter. She was an older woman and not too well. She helped me a little with the work and she was on twenty-four hours' duty with the telephone. That is why she quit, as a matter of fact, it was too much.

Q. Do I gather that you did most of your housework? A. Yes.

Q. And that she wasn't able to do regular or heavy housework?

A. No. She was a practical nurse.

Q. Her function was a baby sitter and to handle the telephone, and with respect to your telephone during this period, what kind of calls were being received in the main?

A. I would say ninety-five per cent were patients calling.

Q. Was Mrs. Sprague charged with the responsibility of taking messages and phone numbers and delivering those messages to the Doctor?

A. Definitely.

Q. Were her duties with respect to the telephone dependent on whether or not you and Dr. Lutfy were at home, or did she have those duties whether you were there or not there? [356]

A. I don't understand exactly what you mean.

Q. Let me rephrase it and put it this way. Supposing that you and Dr. Lutfy were there and you

(Testimony of Bertha A. Lutfy.)

had retired and it is two o'clock in the morning, did Mrs. Sprague have any responsibility as to the phone? A. She answered the phone.

Q. She took care of the phone? A. Yes.

Q. If it was a patient who wanted to speak with the Doctor, what did she do?

A. She would awaken him.

Q. By the way, did she represent that she had any particular skill or ability in the line of nursing or anything of that sort? A. Practical nurse.

Q. Do you know, of your own knowledge, whether or not she made a practice of advising the Doctor's patients from time to time?

A. Yes, she did.

Q. There was some statement I believe, by her to the effect that she did not continuously live at your house?

A. While she was in my employ she lived on the premises.

Q. The entire time? A. Yes.

Q. Did she have a room some other place which was kept [357] for some purpose?

A. She had a room she kept to store her trunks and once a week she went there to get her mail.

Q. By way of compensation, in addition to the twenty dollars a week I believe that has been testified to the Doctor paid, did she get room and board?

A. Oh, yes, and medical services.

Q. And medical services. Mrs. Lutfy, directing your attention to the year of 1945 I will ask you whether or not during that year you sold any article

(Testimony of Bertha A. Lutfy.)

of jewelry? A. Yes, I sold a diamond.

Q. A diamond ring? A. Yes.

Q. Was that in 1945 as best you remember?

A. It was in 1945.

Q. Do you remember to whom you sold the diamond ring? A. To Ping Bell.

Q. Who was she?

A. She was a Phoenix business woman.

Q. How much did you receive for the ring?

A. \$3,500.

Q. What did you do with the \$3,500.

A. I put it in the bank of Douglas.

Q. Do you remember whether it was distributed between two accounts or one account, and if so what kind of accounts? [358]

A. Yes. I put the biggest portion of it in savings account for the interest and the rest in a checking account.

Q. I recollect that the stipulated evidence here shows that there was a savings account at the end of 1945, namely, December 31, 1945, in the name of Tiny Lutfy in the Bank of Douglas in the amount of \$3,020? A. Yes.

Q. Was that part of the proceeds of that ring?

A. Yes.

Q. And there was a checking account in the Bank of Douglas on the same date in the name of Tiny Lutfy in, I believe, the amount of \$487, approximately that? A. Yes, that is right.

Q. Those two accounts were in the name of Tiny Lutfy? A. Yes.

(Testimony of Bertha A. Lutfy.)

Q. Was there anything unusual or any reason whatever to put them in any—to set them up any way they would not be discovered? A. No.

Q. Directing your attention to 1948, just prior, just before you moved to Maryland in the triplex, did you have a piano? A. Yes.

Q. What did you do with that piano, if anything? A. I sold it to Mrs. Basha. [359]

Q. What amount—how long had you had that piano? A. I had it several years.

Q. You had it before December 31, 1945, had you? A. I am not sure.

Q. What did you get for it? A. \$475.

Q. She paid you at the time, did she?

A. Oh, yes, a check.

Q. What general uses, if you recall, were made of that \$475?

A. The check was made out to me and I endorsed it and gave it to my husband and he banked it.

Q. I notice, going back just a moment, that the money from the ring in the Bank of Douglas diminished and a year or so later most of it was gone. Do you know how that was used in general?

A. Well, I bought—I bought a rug.

Q. Did you buy—

A. I lent my husband a thousand dollars.

Q. Buy any property or anything of that sort during that period? A. Not with that money.

Q. Now, did you use any part of it for general living expenses, and so forth?

(Testimony of Bertha A. Lutfy.)

A. Yes. If I had my check stubs I could show those. [360]

Q. Now, Mrs. Lutfy, you know about the Phoenix Sport Shop? A. Yes.

Q. I believe there is an exhibit here in the form of a letterhead introduced by the Government. I don't believe this is the one. I thought the sport shop letterhead had been introduced. Well, tell me this, do you know how and for what purpose the business title or name Phoenix Sport Shop was created or originated? A. Yes.

Q. Will you state to the jury what that was?

A. Well, I wanted to go in business and at the time I wanted to go in the import and export business because I had connections with an importer and exporter in San Francisco who is a friend of mine. Then you couldn't get the things at that time, you just couldn't get the merchandise, so my husband decided he wanted to have a sport shop. Instead of an import and export he would have a sporting goods shop. That is how this started, the Phoenix Sporting Goods.

Q. Did he ever, besides printing letterheads, did he ever actually open the sporting goods store?

A. No.

Q. Why didn't he, if you know?

A. You couldn't get anything. The good things you couldn't get.

Q. Did he maintain those letterheads over the years of [361] '46, '47, and '48?

A. He had them at that time.

(Testimony of Bertha A. Lutfy.)

Q. Do you know what use he made of that firm name, that business name during that period?

A. He bought several guns for relatives and friends.

Q. Buy any for himself, do you recall?

A. Yes.

Q. How many, do you know approximately?

A. I would say, probably, two of them.

Q. Two? A. Yes.

Q. Would you have any idea how many he bought for friends?

A. I never kept track, but I would say not more than six or eight.

Q. Mrs. Lutfy, was there any advantage, to your knowledge, in making these purchases for friends or for yourself in the name of the Phoenix Sport Shop?

A. There was a big saving. He got them wholesale.

Q. He got them wholesale. Do you know of your own knowledge whether or not he made any profit on guns that he purchased for friends?

A. No, he didn't.

Q. He did not?

A. No. He would usually show them the [362] statement.

The Court: At this time, members of the jury, we will take the regular morning recess for ten minutes.

(Recess.)

BERTHA A. LUTFY

previously called and sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Parker:

Q. Mrs. Lutfy, there is one point I should like to amplify somewhat, that is, in respect to the furnishings in the house on Granada at the time you purchased the house. Will you describe them somewhat more in detail?

A. Well, there was a Monterey living room set. There was also a Monterey dinette set. There wasn't any rug on the floor. It was padding, you know that they cement down, and that was the rug. Well, it was furnished very poorly.

Q. Was it completely or partially furnished?

A. We added some to it.

Q. During the period you lived there you added furniture to it?

A. We sold some of it off to a secondhand man, a junk dealer, and then we refurnished after awhile, we refurnished the living room and the dining room. We refurnished part of that place. I know the Monterey had springs sticking out.

Q. What was the condition of the furniture at the time [363] you bought the house with respect to whether it was dilapidated?

A. It was rickety. It was old furniture that had taken a beating.

Q. You replaced the dining room furniture and the living room furniture?

(Testimony of Bertha A. Lutfy.)

A. Yes, and repainted, drapes——

Q. You put drapes in? A. Yes.

Q. And did you put new rugs on the floor, carpeting, anything of that sort? A. Yes.

Q. Did you replace any of the beds, do you recall? A. Yes, in the children's room.

Q. When you sold the place you sold the furniture, did you? A. Yes.

Q. Mrs. Lutfy, did you ever have occasion to work in the Doctor's office?

A. Several times I filled in when the girl was ill, or something would come up.

Q. I will ask you if you ever saw Mr. Whitsett, this gentleman, before?

A. I saw him once in the office and once on the street.

Q. Do you remember whether or not you saw him sometime [364] in 1949 at the office, or thereabouts? A. Yes.

Q. What was he doing there at the time?

A. He was doing some checking and he wanted some old check stubs or vouchers, and I was looking for them for him and he told me not to bother, he would come back another day for them, and I insisted he wait for them, that I would find them, that they were there. In the meantime my husband came in and he knew exactly where they were and he gave them to him right away.

Q. Did Mr. Whitsett say anything about providing him with a place to work or a room to work in that day?

(Testimony of Bertha A. Lutfy.)

A. Yes. He was taken and given the back room.

Q. Did that room have a table in it?

A. Yes.

Q. Was there anything on that table?

A. There was a big enlarger about so big and occupied so much space.

Q. You are referring to a photographic enlarger? A. Yes.

Q. Do you remember what other photographic equipment was in that room at the time?

A. There was a square printer about this big and about so long, and like this, a drier, it is covered with canvas, that you put the pictures in, electric drier is what it was, [365] and the trays, photographic trays were on the table also.

Q. Did anything have to be done with respect to this photographic equipment in order to make space for Mr. Whitsett to work in that room?

A. Yes, it all had to be moved over so he could put his things on it.

Q. Mrs. Lutfy, do you know of your own knowledge whether or not your husband utilized in his professional practice photographic equipment?

A. Yes. I have helped him take some pictures even.

Q. You have helped him take pictures?

A. Yes.

Q. What kind of pictures?

A. Kodachrome slides. I helped him take a picture of a tumor that was about so big that he brought home and we put it on the lawn and filled it

(Testimony of Bertha A. Lutfy.)

with the garden hose to take a colored slide of it.

Q. Did he take pictures frequently in the office of patients that might have some visible signs of disease and that sort of thing?

A. I have seen the pictures that he has taken but I can't say I was always there when they were taken. I have seen them. I know he did, yes.

Q. Are you able to state whether or not his interest in photography was primarily connected with his professional work? [366]

A. At that time, yes.

Mr. Roylston: I object as conclusion.

Mr. Parker: That may be leading and may be a conclusion. I think she observed what his interests were.

The Court: She may tell what she observed.

Q. I believe you already answered the question?

A. Yes.

Q. Mrs. Lutfy, I will ask you whether or not to your knowledge your husband ever sought to conceal any records, destroy any records, or in any way deceive or mislead Mr. Whitsett or any other representative of the Internal Revenue? A. No.

Mr. Roylston: Before this is answered, I didn't hear the first part of the question. If it is what she did, I have no objection. If it is what the Doctor did, it would be outside of this witness' knowledge of what the Doctor did.

Mr. Parker: I asked her "to her knowledge."

Mr. Roylston: I will withdraw my objection.

Q. Did you ever seek to deceive Mr. Whitsett

(Testimony of Bertha A. Lutfy.)

or any of his associates respecting your business and financial affairs? A. No.

Mr. Parker: You may cross-examine.

Cross-Examination

By Mr. Royston: [367]

Q. Mrs. Lutfy, I believe you stated you worked as a real estate saleslady? A. Yes.

Q. While your husband was in the Service?

A. Yes.

Q. About how long was your husband in the Service? A. About seven or eight months.

Q. About seven or eight months, is that your answer? A. Yes.

Q. During this time that you worked for, I believe you stated, Fisher? A. Mr. Guy Fisher.

Q. Was that during the year 1945?

A. '45, yes.

Q. Do you recall approximately what your income was from the real estate work? First, let me ask you this. Were you paid on a salary or commission basis? A. Commission.

Q. Do you recall approximately what your income was during that period?

A. I am trying to figure the commissions I made. Probably that year I may have made around seven or eight hundred dollars.

Q. That was during the year of——

A. '45.

Q. That was reflected on the '45 return? [368]

A. I told my husband about it, yes.

(Testimony of Bertha A. Lutfy.)

Q. What I was trying to establish is the year it was in. A. '45.

Q. For the income year of '45? A. Yes.

Q. Now, concerning the testimony of the gifts which were made by your mother during her lifetime. I believe you stated that the largest single cash gift you received was about \$300?

A. That is right.

Q. These other articles, lace tablecloth, and different clothing gifts and such that she made, those were kept and used by the family, is that correct?

A. What do you mean?

Q. In other words, you didn't take these articles in and get the cash for them or sell them to anybody? A. No, no.

Q. You kept those gifts? A. That is right.

Q. I believe you were questioned whether your husband had any life insurance policies prior to 1945? A. Yes.

Q. To your knowledge were these policies ever cashed or did he make any loans from the company?

A. He made loans on them, yes. [369]

Q. This loan you were talking about——

A. All I can say, he borrowed from life insurance companies.

Q. Is that approximately twelve or fifteen thousand dollars loan, is that the one you are talking about now?

A. That is from an insurance company.

Q. Prior to 1945 do you recall whether he received any specific amounts from loans from insur-

(Testimony of Bertha A. Lutfy.)

ance companies or from surrendering any of those policies? A. I don't believe so.

Q. With the exception of that, I have forgotten if it is twelve or fourteen or fifteen thousand dollar loan, with the exception of that, do you recall any other loans he made from life insurance companies?

A. During that year, I don't believe so.

Q. Now, as far as you know, did he cash any of these life insurance policies in, surrender them, during this period, '46, '47, and '48?

A. I don't think so. I am not sure.

Q. Now, concerning this automobile which was stolen, Lincoln Continental Convertible, I believe it was, this exhibit, I think it was "D," the money order, that is the sum of \$5,600. Do you recall what the purchase price of that automobile was?

A. I think it was fifty-four something. [370]

Q. Now, where were you when you purchased this automobile? A. In Chicago.

Q. You purchased the car in Chicago?

A. Yes, sir.

Q. Do you recall where you purchased it?

A. In a bank. The transaction was handled in the bank.

Q. I mean, was it from a local automobile agency in Chicago?

A. The car came from a local Chicago agency, yes. That is where it was driven out of.

Q. Did you purchase it from the agency?

A. It was—I don't think that the agency sold it

(Testimony of Bertha A. Lutfy.)

directly to me. I paid a man in the bank for it, but the car I picked up at the agency.

Q. This person you paid the money to, was that a man connected with the bank or with the automobile agency?

A. With the automobile agency I believe.

Q. As best you remember, the purchase price was \$5,400? A. I believe it was 5,400.

Q. Now, do you know why the loss of that automobile would have been listed on the return as \$6,700, Mrs. Lutfy?

A. We had quite a lot—I would say there was expense involved.

Q. Just what type of expense, Mrs. Lutfy?

A. Well, there were telephone calls, there were—we [371] had to get a lawyer. My expense involved in flying back there, that ran the price of it up.

Q. You included your transportation to purchase the car, you included that? A. Yes.

Q. As a loss? A. Why, yes.

Q. Where were you when you first learned of the car? A. In Phoenix.

Q. Then you flew back there and had the money wired to you? A. Yes.

Q. At the time you didn't see fit to take the money with you?

A. All I was to do was to fly back there. When the car was to be purchased the money was sent to me.

Q. So you estimate there were approximately

(Testimony of Bertha A. Lutfy.)

\$1,300 expense that you added on to the loss of the car for your income tax purposes, is that correct?

A. I don't know the exact amount.

Q. But that would explain why the figure is listed as \$6,700 instead of \$5,400, is that correct?

A. Yes, it would.

Q. Concerning your mother and her business, I believe your brother testified that when your father died he left a [372] sizable estate and your mother held it together over the years, is that correct?

A. Yes.

Q. Do you know whether the size of the estate increased between the time your father died and the time your mother died?

A. Oh, yes.

Q. Your mother handled all of the estate herself, is that correct; in other words, after your father died, everything was left to your mother and she handled it?

A. Yes.

Q. Your mother was relatively well versed in business affairs, is that right?

A. I would say yes and no.

Q. In other words, in managing several hundred thousand dollars worth of property she knew fairly well what she was doing?

A. She sought other advice constantly.

Q. At the time this loan was made from your mother, was a note given to her for the loan?

A. I don't know about that.

Q. I believe you stated the loan had never been paid, is that correct?

A. That is right.

(Testimony of Bertha A. Lutfy.)

Q. Did it show up in the estate as an asset of the estate? [373]

A. It was a verbal thing, no, no.

Q. So that the estate never collected the amount of that loan? A. No.

Q. Was it deducted from your share of the estate? A. No.

Q. I am going to show you Government's Exhibit 27 and ask you if you recognize the handwriting down there as your husband's handwriting?

A. Part of it.

Q. Can you show me which particular parts?

A. This is, this is, this isn't.

Q. In other words, starting with the word "depreciation" all the way down to the words "improvement and addition" all that from depreciation to the words improvement and addition is in your husband's handwriting, is that correct?

A. Yes.

Q. So this depreciation schedule, the entire schedule itself is figured up in the Doctor's handwriting?

A. I don't know who put the check mark there, but the rest is.

Q. So, he knew enough about accounting to figure up a depreciation schedule?

Mr. Parker: That is objected to as argumentative.

The Court: Objection sustained. [374]

Q. Concerning this triplex which there has been quite a bit of discussion about, I believe you stated

(Testimony of Bertha A. Lutfy.)

your family used two units? A. Yes.

Q. Wasn't the third unit used as a workshop or a storage room, something of that nature?

A. Later it was.

Q. That was after the year '47. Do you recall what year that was in?

A. We didn't buy it until '48, wasn't it.

Q. I may be off on the figures, but during the year '48 was it used as a workshop or do you recall?

A. I don't know for sure if it was maybe the latter part of that year or in '49, but after I couldn't rent it it was used as a workshop.

Q. Concerning this lady, Julia Sprague, that lived there with you and your family, do you recall approximately what period of time she lived there on the premises? A. It was quite some time.

Q. Wasn't she employed as a regular employee approximately three months then came in on part-time basis for baby sitting after that three-month period?

A. I never had her just as a baby sitter. All the time she was employed by me, she lived on the premises.

Q. What I am trying to get at, there was a three month's [375] period she lived with the family all the time, then after that three months' period she came in and worked whenever you called her to come in and work?

A. No. She was employed by me twice, and while she was employed she lived with me.

Q. Do you recall the approximate length of time

(Testimony of Bertha A. Lutfy.)

she was employed there and lived there on the premises?

A. I don't recall, no I don't. There was a little break in there somewhere but I don't recall exactly when that was.

Q. Do you recall if it was three months would be the approximate length of time?

A. I couldn't say.

Q. Concerning this photographic equipment, I believe that you stated to your own knowledge your husband's main interest in this photographic equipment was in a clinical nature? A. Yes.

Q. Was it his usual procedure to take those clinical photographs on the front yard of your home?

A. This particular one where I assisted him was on the front yard of my home.

Q. Did he collect together his photographic equipment, the tumor and the whole works and bring it out to your house and spread it on the front yard?

A. No. He brought the tumor in a pan from the hospital and the camera. He had a picture of the patient before [376] surgery when the abdomen was tapped to take the liquid out, and after surgery because it was very unusual and we even had a ruler there to try to measure it.

Q. This was on the front yard of your home?

A. That is right. I didn't want it in the house and we used the garden hose to try to fill the tumor up.

(Testimony of Bertha A. Lutfy.)

Q. The point I am trying to get at is, was the photographic equipment at the home?

A. No. He brought it with him.

Q. He brought the tumor and cameras and the whole works out to your home to make the picture?

A. What do you mean by the whole works?

Q. Whatever is necessary to make these photographs. Did you use anything else beside the camera? Did you use any special lighting fixtures or anything like that?

A. It was outside. We didn't need any additional lights.

Q. Let me ask you this question. If the Doctor had the necessary equipment down at his office and had the tumor there do you know why he brought it home to make the photograph on the front yard?

A. Because I helped him with it.

Q. I say do you know why he brought it home. In other words, why wasn't the picture made down at the office where the photographic equipment was located, do you know?

A. Well, he took pictures before surgery. [377]

Q. I am talking about this big tumor thing.

A. He took pictures before surgery at the hospital, then after surgery he brought this home and took the last of them.

Q. You don't know why he didn't take the picture of the tumor at the office where the photographic equipment was located?

A. I wouldn't say that the photographic equipment was at the office at the time. As I remember,

(Testimony of Bertha A. Lutfy.)

he brought the camera with him because he had taken pictures at the hospital also.

Q. So he brought it to make it in the front yard?

A. We were closer to it.

Q. Is that his usual clinical procedure with his photographic equipment?

A. In that particular case that is what I can answer because I was there and helped.

Q. Now, Mrs. Lutfy, I believe you testified at great length you lived very simply and frugally during this period of '46, 47, and '48? A. Yes.

Q. I believe you stated that you fed two adults and three children on a total of seventy-five to eighty-five dollars a month? A. Yes.

Q. You fed the five of you on seventy-five to eighty-five [378] a month? A. Yes.

Q. That is the total for all of the family?

A. Yes.

Q. During this period of '46, '47, and '48, did you do any entertaining to any extent at home; by entertainment I mean anything in the nature of cocktail parties or dinner parties or anything on that line?

A. My house wasn't fit to entertain at cocktail parties. The only entertainment I did in my house was when my brothers would come to my home for dinner and we had another couple, very good friends at the time, and they would drop in, or we would drop in at their place.

Q. Outside of that additional entertainment, you

(Testimony of Bertha A. Lutfy.)

fed your family on seventy-five to eighty-five a month during this period, is that your estimate?

A. Yes.

Q. During this period that you were living very frugally, I believe you stated you went out, or almost never went out?

A. I can remember six months at one time where I never even went to town.

Q. During this period of '46, '47, and '48 you or your husband or the family, I don't know how it is, carried on, but at any rate you were members of the Arizona Country Club in Phoenix, isn't that correct? [379]

A. Let us find out exactly when we joined there because the club wasn't even built.

Q. Let us put it this way. Sometime during the period of, that is in question here, either '46 or '47 or '48, for several months during that period you were members of the Country Club?

A. We paid dues.

Q. That is rather an exclusive Country Club in Phoenix?

A. They call it the poor man's country club in Phoenix.

Q. During this period that you were living very frugally, I believe at one time you owned a Cadillac automobile, isn't that correct?

A. That was—I received that for rent on a piece of property.

Q. At another time during this frugal period is

(Testimony of Bertha A. Lutfy.)

when you purchased this Lincoln Continental Convertible? A. Yes.

Q. That was during this frugal period?

A. Yes.

Q. You owned a station wagon at one time during the frugal period, is that correct? A. Yes.

Q. During this period you had at least one automobile and most of the time you had two, is that correct, or three? A. Oh, no. [380]

Q. Did you ever have over two?

A. No. I don't know who would drive it. The babies were small.

Q. Did you have two automobiles during much of the time?

A. Not during all that period.

Q. During part of the period you had two automobiles?

A. I would have to check. During a portion, but not all the time.

Q. It was during this period you were living very frugally on a very small amount, it was one time during that period a neighborhood poker party you lost approximately five hundred and some dollars, and on another neighborhood poker party you lost a couple hundred?

A. It wasn't a neighborhood poker party.

Q. This party among a group of your friends. What I am getting at is this. This poker party with your friend, Mr. Madison and some other friends, you lost on one occasion five hundred and something and on another occasion two hundred and some-

(Testimony of Bertha A. Lutfy.)

thing, this is during the period you were living frugally? A. Yes.

Mr. Royston: That is all. [381]

Redirect Examination

By Mr. Parker:

Q. Mrs. Lutfy, there are one or two questions I would like to ask. With respect to this Lincoln that was stolen at the end of '47, had you folks put any extras on it or done any work on it between the time you bought it and the time it was stolen?

A. Oh, yes. Wasn't a spotlight put on it, and my husband's uncle made him a sterling silver gear shift, quite an ornate piece of equipment; that was there.

Q. Do you remember buying any special type of jack?

A. Yes. We bought, I think, a hydraulic, what kind?

Q. Do you remember whether or not a spare tire came with it at the time you bought it for \$5,420, whatever the cost was? A. I don't know.

Q. You don't remember that?

A. I can't say.

Q. Did you make a claim to the insurance company? A. Oh, yes.

Q. Was the claim in the same amount that Mr. Royston mentioned, the \$6,700, as far as you recollect, or do you know? If you don't remember——

A. The car was insured for, I believe it was, a stated amount, \$5,400.

(Testimony of Bertha A. Lutfy.)

Q. Mr. Roylston indicated you had claimed \$6,700. Do you [382] remember whether or not the claim was based on the present value of the car in Phoenix at the time?

A. Yes, I believe it was.

Q. Do you know whether or not your husband secured legal advice with respect to the making of that claim? A. Yes.

Q. Mr. Parker: May this be marked for identification.

(Defendant's Exhibit F marked for identification.)

The Clerk: Defendant's Exhibit F for identification.

Q. Mrs. Lutfy, look this letter over, read it through from start to finish and then I will ask you a question. Do you remember whether or not you have ever seen that letter before? A. Yes.

Q. Is that a copy of the letter your husband sent to the lawyer at the time? A. Yes.

Q. Was James Struckmeyer your lawyer at the time? A. Yes.

Q. That is the Phoenix firm of Struckmeyer and Struckmeyer? A. Yes.

Q. Does this letter pertain to the loss of this car?
A. Yes.

Mr. Roylston: No objection.

Mr. Parker: We offer it in evidence. [383]

The Court: It may be admitted.

Mr. Parker: Ladies and gentlemen of the jury, I will read you this Exhibit F which is now in evi-

(Testimony of Bertha A. Lutfy.)

dence. This letter is dated March 17, 1948, and addressed to Mr. James Struckmeyer, 207 Luhrs Building, Phoenix, Arizona. "Dear Sir: I am inclosing herewith a copy of our complaint, having filled in under paragraph 2, the sum of \$77.00 which represents extra equipment carried in the automobile at the time of the loss.

"I checked with Mr. Stevens of the Lincoln-Mercury-Phoenix, Inc., today, and the cost of delivery of an automobile similar to the one we lost amounts to \$5,472.15. The actual cost for our car, however, in Chicago, was \$5,420 which does not include a little over \$1,000 of commissions and extras paid for this car.

"I would like to have your comments on the following: 1. The advisability of suing for the actual market value of the car, \$6,500 instead of the regular list price of \$5,472.15. 2. The addition of interest starting two months after the loss of the car, and running up to the time that cash settlement is made. 3. Punitive damages.

"Call me at your convenience. Sincerely yours,
L. P. L.:rm, encl."

You did pay somebody a commission in reference to the acquisition of this automobile? [384]

A. Yes.

Q. Now, Mrs. Lutfy, is your husband in the habit of gambling at cards or otherwise?

A. No.

Q. One matter I forgot to ask you about. Do you know whether or not he makes a practice, and

(Testimony of Bertha A. Lutfy.)

did during the years of '46, '47, and '48 of remembering some or all of his patients at Christmas time with small gifts? A. Yes.

Q. Do you know why that is done, the purpose of doing that? A. It is good business.

Q. A matter of good will?

A. That is right.

Q. There has been some testimony here regarding certain purchases at Rosenzweig's, consisting of some compotes. What is a compote; I wouldn't know?

A. A compote, well, this one was hollow ware, a silver one. It is a silver dish with a little stem on it that I myself purchased for a gift for a patient.

Q. Was that given to a patient? A. Yes.

Q. Did you ever use it? A. Oh, no.

Q. Were there other similar gifts from time to time [385] acquired from Rosenzweig's and elsewhere? A. Various places, yes.

Q. What season of the year would Dr. Lutfy ordinarily make such gifts?

A. At Christmas time and then if a patient had—a real good patient—like their son would get married or if they happened to be a friend of ours. You have some patients that you have had for years that are also friends, and I mean there comes an occasion with a new baby or something where you give gifts. You have got to.

Q. Was that done to stimulate his professional business? A. Yes.

Mr. Parker: That is all.

(Testimony of Bertha A. Lutfy.)

Recross-Examination

By Mr. Roylston:

Q. Do you recall who those compotes went to?

A. That I don't even remember the year. I don't even remember the year they were purchased in, but at the time I bought several different gifts.

Q. You bought the gifts?

A. Yes, but I don't know what went to who.

Mr. Roylston: That is all. No further questions.

Mr. Parker: We are approaching the hour of 12:00. Mr. Roylston and I have agreed last week that if Mr. Otto [386] Linsenmeyer, an attorney and brother of Mrs. Lutfy and brother of Howard Linsenmeyer, a witness here and a son of Ottelia Linsenmeyer, if he were present he would testify in substantially the same manner as Howard Linsenmeyer regarding gifts made by his mother to various members of the, what we will for convenience, call the Linsenmeyer family, which includes Mrs. Bertha Lutfy.

Mr. Roylston: It is so stipulated.

The Court: Counsel have agreed, members of the jury and you have heard the agreement and stipulation, that if Otto Linsenmeyer, a brother of Mrs. Lutfy, were called to the witness stand, his testimony concerning the practice of Mrs. Linsenmeyer in giving gifts to members of the family would be the same as that heretofore given by Howard Lin-

senmeyer. So you will take that, namely, if he were called he would so testify and you will treat it as if he so did testify. [387]

* * *

R. DALE MOSER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Parker:

Q. Will you state your name, please?

A. R. Dale Moser.

Q. Where do you live, Mr. Moser?

A. 5975 Orange Blossom Lane, Phoenix, Arizona.

Q. How long have you lived in Phoenix? [391]

A. Since July, 1950, temporarily; I brought my family over, my wife over in February, 1951.

Q. And where did you live prior to moving to Arizona?

A. In Los Angeles, most of my life, some little while in Sacramento.

Q. Mr. Moser, what is your occupation or profession?

A. I am a Certified Public Accountant.

Q. How long have you been a Certified Public Accountant in Arizona and licensed as such?

A. I was a Certified Public Accountant when I came to Arizona, and the law of Arizona requires you have residency of one year before you are

(Testimony of R. Dale Moser.)

given a certificate in Arizona. So I have been certified in the State of Arizona since 1951.

Q. Were you certified as a Public Accountant in the State of California before you came to Arizona?

A. Not as a Public Accountant, as a Certified Public Accountant. They have two of them over there that they don't have in Arizona.

Q. How long had you been certified over there?

A. In 1947.

Q. Had you previously had some training in accountancy?

A. Yes, I had. I had taken a course of accountancy with the LaSalle Institute, which I graduated from, then after coming back from the service I took some postgraduate work, residency at the Southwestern University in Los Angeles. [392]

Q. Had you previously attained a college degree?

A. Yes, I had.

Q. At what institution?

A. At the University of Southern California.

Q. And are you affiliated or associated with any firm of accountants?

A. Yes, I am a general partner in the firm of L. N. Treadaway & Associates.

Q. Where is the head office of that firm?

A. In Phoenix.

Q. Does your firm, of which you are a general partner, have offices in other cities in Arizona and California?

(Testimony of R. Dale Moser.)

A. We have an office in Tucson; we have an office in Los Angeles.

Q. Have you had an office here in Tucson, your firm, for some time? A. Yes, we have.

Q. And you have an office in Los Angeles?

A. Yes, we have.

Q. How many Certified Public Accountants are associated or employed with your firm in the Phoenix office?

Mr. Royston: I object to that as immaterial.

The Court: He may answer.

A. I believe at the present time we have 11 Certified Public Accountants in our Phoenix [393] office.

Q. Mr. Moser, will you relate to the Court and the jury the general nature of your accounting work—well, in order to limit it, since, say, 1950?

A. Since 1950 I have engaged in the general practice as a Certified Public Accountant continuously, in which I have conducted several audits, large, small and medium size and have prepared tax returns for a great number of our clients, have represented our clients in discussion of their tax returns with the representatives of the Federal Government.

Q. Have you done that in a great number of cases or only in isolated cases?

A. In a considerable number of cases.

Q. Have you audited the books and records of clients big and small in connection with their income tax troubles and disputes?

(Testimony of R. Dale Moser.)

A. Yes, I have.

Q. Now, Mr. Moser, did you ever have any experience as a tax official?

A. I don't know whether you would call it an official or not; I was with the State of California Income Tax Division for about two years prior to entering the service.

Q. And you were in the military service during the war years? A. That is right.

Q. Now in connection with your auditing work since the [394] war have you had occasion to make audits over quite a wide area of the world?

A. A considerable extent of it, yes. I wouldn't say all the countries, of course, but Tokyo, Okinawa, Guam, and then several eastern cities in the United States.

Q. Ever been south of the border as an auditor?

A. Mexico City.

Q. And your firm has sent you as far as Tokyo, Japan, to make audits of books of companies?

A. They have.

Q. And how recently was that?

A. That was last year, I believe, early part of last year.

Q. Now, Mr. Moser, I assume you belong to some professional society or societies?

A. Yes, I do.

Q. What?

A. I belong to the American Institute of Accountants; I belong to the Arizona State Society of Certified Public Accountants, and belong to the

(Testimony of R. Dale Moser.)

Maricopa Society of Certified Public Accountants.

Q. Mr. Moser, are you acquainted with Mr. Whitset here? A. I have met Mr. Whitset.

Q. Are you acquainted with Mr. Tucker?

A. I have met Mr. Tucker. [395]

Q. Are you acquainted with the Regional Attorney at Los Angeles for the Internal Service, Mr. Cass? A. I have met Mr. Cass.

Q. Have you had dealings with some or all of these men in connection with this and other cases?

A. I have.

Q. Mr. Moser, you know Dr. Lutfy?

A. Yes, I do.

Q. And have you been employed by him for some time to do auditing work?

A. Yes, I have.

Q. And do you recall about when he employed you?

A. It was in the latter part of 1951.

Q. In the latter part of 1951?

A. '51. I can't give you the exact day.

Q. What was the nature of the work for which you were employed by him?

A. Dr. Lutfy had received notice that he was being investigated or had been investigated and received notice from the Internal Revenue Department that he was being considered for indictment, and asked me to check into his records and help him establish his innocence in this case.

Q. Mr. Moser, I assume you are being compensated for your services? A. I am. [396]

(Testimony of R. Dale Moser.)

Q. Does your compensation depend in any way upon the outcome of this case?

A. It does not.

Q. Now, Mr. Moser, upon your being employed by Dr. Lutfy did you undertake an audit of his books and records? A. I did.

Q. And did you find that he had books and records? A. I did.

Q. And will you relate in a general way or describe in a general way to this jury what you did by way of auditing his books and records, and for especially the years 1946, 1947, and 1948?

A. I examined his duplicate deposit slips for the years 1946 and major portion of 1947. They were photostatic copies which had been obtained by the Revenue Department and turned over to Dr. Lutfy when they were through with them.

Q. If you will talk a little slower and a little louder. I realize you are looking at me and the jury is sitting over there. If any juror cannot hear the witness at any time, if you will hold up your hand I am sure Mr. Moser will talk louder and slower. I interrupted your answer.

A. (Continuing): I examined the photostatic copies or deposits which had been retained by the Revenue Department in their investigation and turned over to Dr. Lutfy for the year 1946 and major portion of 1947. The year 1948 they did [397] not have the photostatic copies, but Dr. Lutfy told me he had gone to the banks with the Revenue people and identified the names on the deposit slips for

(Testimony of R. Dale Moser.)

that year. We did not obtain those photostatic copies from the banks because it was difficult to tie in item for item, due to the doctor's writing which is not most legible and the fact there were many items of income or monies coming to the doctor which were not professional income. Our major project at the time was to determine whether or not the doctor had reported as professional income all of the money which had been deposited in the bank which could not be identified as coming from some other source. For the two years which we had deposit slips to substantiate any computation we found that he had reported substantially more professional income than went into the bank. In other words, we could eliminate all items which had been deposited in the bank which could be identified as coming from some other source; and by the elimination of these items the remaining deposits which went in the bank were less than the doctor reported as income for that period.

Q. You did examine then his income tax returns for 1946, 1947, and 1948? A. Yes, I did.

Q. And you have those copies, do you, in your file? A. Yes.

Q. From which you have been working? [398]

A. That is correct.

Q. Just briefly state, Mr. Moser, to the jury what other records you found that the doctor kept or had kept for him in the course of his business and profession?

(Testimony of R. Dale Moser.)

A. I found that the doctor kept a log book, which is a common book used by most professional men, most doctors, which is arranged to give them the information that they require for their daily work. These log books show the patients by name, whether it was a charge, whether it was a cash call or whether it was something paid on account. Also has sections in which expenditures, that is expenditures may be listed; it has summaries, places for summaries where monthly summaries can be made of expenses and all income and has spaces for yearly summaries where the entire year's work can be summarized.

Q. Now, Mr. Moser, just by way of letting the jury know what we are talking about I have simply picked up at random a book here stamped 1948. What is this?

A. This is a daily log for physicians.

Q. Is that what you are talking about——

A. That is the book I am talking about.

Q. ——when you say log book?

A. That is correct.

Q. Did he have such a log book for each of the three years that were involved here? [399]

A. Yes, he did.

Q. Do you know where this type of log book, are you familiar with this type of a form?

A. Yes, I am familiar with that. I have purchased that form for other doctor clients.

Q. Is this designed specifically for doctors?

A. It is, yes.

(Testimony of R. Dale Moser.)

Q. Put out by some national publishing or whatever kind of company puts them out?

A. That is correct.

Q. Is this type of record, a daily log book, used widely by physicians and dentists?

A. Yes, it is.

Q. People of that character. Now, in this log book will you state to the Jury the nature of the data which the log book contains so that they may know?

A. It has a page for each day in which the patient's name is listed here, type of service, whether it was a charge and the amount of the charge, whether it was a cash call and the amount collected, or whether the patient paid something on account which he had previously charged. They have a page for each day. At the end of each month they have a business summary which shows the total cash business, the total received on account and the total cash received; it also has charge business and total business, which is, you can see from this, [400] was not compiled, just the cash transactions were compiled by the doctor's secretary. It also has spaces for listing expenses under various categories, such as drugs and supplies, salaries and labor, stationery. Then it has summaries, in which these items are summarized at the end of each month.

Q. Now, Mr. Moser, I believe I understood you to say this is a rather customary record widely used by doctors and dentists?

A. That is correct.

(Testimony of R. Dale Moser.)

Q. From an accounting point of view does this type of record have any manifest imperfections, Mr. Moser? A. Yes, it does, definitely.

Q. What would be the criticism of this type of a record?

A. This is what we would call in general accounting more of a daily journal, and the daily journals are then posted into a general ledgers and subsidiary ledgers in which a debit and credit is posted for each item so the books are always in balance; if anything is incorrect in the journals, not shown correctly on the ledger it would be out of balance and be able to detect it. This method of accounting you have merely a summary of what transpired. That has to be, your figures for a year have to be compiled from that. They are not automatically proven by a double entry system which we use in almost all accounting phases.

Q. I take it this is not a double entry [401] system? A. No, it is not.

Q. It is a recognized system but not the double entry system? A. That is correct.

Q. Then I take it from what you have said that errors when they occurred would not become obvious so readily in this type of system as would be the case of a double entry?

A. That is correct. There is nothing to indicate there is an error unless it is rechecked would be the only way you would find an error. There is nothing obvious from the records.

Q. What other types of records did you find that

(Testimony of R. Dale Moser.)

the doctor kept and which you resorted to in your audit?

A. I found that he kept his cancelled checks, which I examined. I found that he kept a patient card for each patient, which I examined.

Q. Now, on this patient card what sort of material was entered there usually?

A. There was entered only for the patients who had charged their call, not for the ones who had paid cash at the time of the visit.

Q. The cash ones went in the log book?

A. The cash ones went in the log book and there was no patient record maintained for that. But a charge was placed upon the card from the log book, then when the patient paid it was recorded in the log book and, of course, finally posted to [402] the card.

Q. Are you referring, Mr. Moser, to the same log book and patients' cards or clinical cards, as they are sometimes referred to, that the Government's witness, Mrs. Raye Way, talked about when she was on the witness stand here?

A. Yes; the same cards and same log book.

Q. You say you found cancelled checks?

A. That is correct.

Q. And were there check stubs?

A. There were check stubs in most cases and some cases they were counter checks or checks written away from the office and not given a number and would be signed by the doctor and went through

(Testimony of R. Dale Moser.)

his counter course, so they would not have a stub for those.

Q. What percentage or proportion, roughly, of his cancelled checks were what you refer to and describe as counter checks?

A. I would say, just as a hazard, it would be probably less than one-half of one per cent.

Q. Most of the checks he had a stub and it was written out? A. Written on the stub.

Q. In a regular check book?

A. That is correct.

Q. Now, did you have occasion to examine his bank [403] statements? A. Yes, I did.

Q. Those are the yellow ledger sheets of the kind Mr. Wightman who was here as a Government witness from the bank had?

A. That is correct.

Q. Now, from your examination of the doctor's records, and based upon your experience as an accountant and an auditor, would you say that the doctor during the years here in question kept and maintained a regular set of books?

A. Yes; I would say he kept a regular set of books.

Q. And based upon that same experience, what could you say, if anything, with regard to how his books compared for completeness and detail with other books and records which you have had occasion to examine and audit of similar types?

A. Well, I have found some that had much less regularity than Dr. Lutfy's; I have found some that

(Testimony of R. Dale Moser.)

have had more, that were more complete, I would put it that way, than Dr. Lutfy's.

Q. With reference to average, how would you say his books and records stacked up as professional records?

A. I would say for a professional man they would be about average.

Q. About average? A. About average.

Q. Now, did you ascertain—I assume in the course of [404] your audit you had occasion to consult with Dr. Lutfy frequently?

A. That is correct.

Q. Did you ascertain in the course of those conferences and consultations whether or not he has any training in accounting or any particular familiarity with it?

A. He gave no indication of having.

Q. Did he disclose to you in the course of these conferences you had with him any particular familiarity with the principles of income tax, federal income tax accounting?

A. Not to a great extent, no.

Q. Now, Mr. Moser, as you have heard in the course of this trial the Government is apparently relying primarily upon a net worth approach to the problem of Dr. Lutfy's income for these three years. Are you familiar with that net worth method of arriving at income? A. I am.

Q. Could you for the benefit of the Jury and maybe for my benefit tell the Jury in a few words

(Testimony of R. Dale Moser.)

or define this net worth method that is employed in this case by the Government agents?

A. The net worth theory is that given a certain amount of assets at a starting point and having a certain amount at a later date there must have been a certain amount of income in order to provide for the additional assets. That in a [405] nutshell is the theory.

Q. Does that theory stand up if in the meantime the particular individual has non-taxable sources of income?

A. I think, Mr. Parker, that what I meant was that he would have to have income, not necessarily taxable, but you would have to show that all sources of income that he had, taxable or non-taxable, would come to this point. In other words, there could be a considerable amount of non-taxable income or there could be——

Q. Does it involve a matter of covering every single last asset as of the starting period in order to be valid?

A. That is correct.

Q. Assume that for instance some item, we will say, for example, like cash on hand, were not definitely ascertained as of the starting point, would the method be valid?

A. It would be subject to quite a good deal of criticism because you have not established the fact he might have spent a considerable amount of money which they did not give him credit for. It would throw the whole theory out if there was any considerable amount of money.

(Testimony of R. Dale Moser.)

Q. Now, Mr. Moser, I believe we were furnished with a copy of Government's Exhibit Number 33?

A. That is correct.

Q. You have a copy of it there—I don't necessarily want it, but that was, as I remember, Mr. Whitsett's [406] computation which is supposed to represent Dr. Lutfy's net worth as of December 31, 1954, and then as of the end of each year to and including the year 1948? A. That is correct.

Q. Now, you are aware, are you not, of the certain stipulations which have been entered into in this case? A. Yes, sir.

Q. I will ask you, Mr. Moser, if you prepared a net worth statement for Dr. Lutfy for the same period covered by the net worth statement represented by Exhibit 33? A. I did.

Q. And do you have that with you?

A. Yes, I do.

Q. Will you produce the original of it, please?

A. This contains one for each of the three years.

Q. You have prepared one showing the starting point insofar as it has been disclosed here?

A. That is correct, sir.

Q. And showing the net worth at the end of 1946? A. That is correct.

Mr. Parker: May this be marked for identification?

(Defendant's Exhibit G marked for identification.)

Q. (By Mr. Parker): Referring to defendant's Exhibit G for identification, I will ask you, Mr.

(Testimony of R. Dale Moser.)

Moser, what was the source of your asset figures which you used in the preparation [407] of that Exhibit?

A. Exhibit 33 of the Government and their net worth statement.

Q. In other words, to prepare the Exhibit G you accepted and used the figures produced by the Government?

A. That is correct.

Q. Now, am I correct in understanding that in the bill of particulars and other conferences with the Government you had been given a different set of figures?

A. That is correct.

Q. And the first time you got these figures was here in the courtroom the other day?

A. That is correct.

Q. Nevertheless you took their figures and you used the Government's figures they contend for for the preparation of this net worth statement?

A. That is correct.

Q. Would you, in order that we may have continuity, would you produce the net worth statement for the year 1946?

A. You mean of the Government's?

Q. Yours. A. This is mine.

Q. This is 1946?

A. Yes, this is starting December 31, 1945, transactions and ending up with 1946. [408]

Q. How would be the most intelligible way to handle these, put them all before the Jury at once or take one at a time?

(Testimony of R. Dale Moser.)

A. I think you would have to take one year at a time.

Mr. Parker: We offer defendant's Exhibit G for identification, subject, of course, to the explanation I expect to elicit from the witness the same as we did with Government's Exhibit 33.

Q. (By Mr. Parker): Does this cover all three years?

A. Yes. It can be separated if you wish.

Mr. Parker: I didn't realize it covered all three years, but that is fine. We offer it, your Honor.

Mr. Royston: It is offered for all three years now?

Mr. Parker: Yes.

Mr. Royston: No objection.

The Court: It may be admitted.

(Defendant's Exhibit G marked in evidence.)

Q. (By Mr. Parker): While Miss Dougherty is marking that Exhibit, do you have copies of this Exhibit which we can hand to the Jury so they can follow your discussion of it? A. Yes.

Q. And also for the Court. Now, Mr. Moser, I must confess something that you already know, and that is that I am an ignoramus on subjects of accounting, and, therefore, I would like to ask you to explain to the Jury how you compiled this, [409] what its significance is, referring to defendant's Exhibit G in evidence?

A. I have taken the net worth at the beginning of the period which was on Exhibit 33——

(Testimony of R. Dale Moser.)

Q. Now, Mr. Moser, as you say this am I clear that you have taken the Government's figures?

A. The alleged net worth on Exhibit 33, I have so termed it.

Q. For instance, this \$1,000 cash on hand, were you able to verify that figure in any manner?

A. No, I was not. I have taken the Government's figure on that for that item.

Q. Okay. Taking the Government's figure, now go ahead.

A. In the first column are the items that are contained in Exhibit 33 for the year December 31, 1945. The items are the same, they are rearranged somewhat in order to more effectively show what this statement will prove. In the second column I have taken the funds which were available at the beginning of the year, which were the cash funds, I have included all items of income which we definitely know about which were non-taxable and which were taxable. In the third column I have shown up under the cash position the amount of cash that was on hand at the end of the year.

Q. That again is an arbitrary figure; were you able to find any verification—— [410]

A. No. That is an arbitrary figure as taken from Government's Exhibit 33, that is correct. We must be able to have that much on hand as well as spend the money which was spent during the year in order to balance out, so that is added to the expenditures in that third column. Then the items on the fourth column we have carried over to the alleged net

(Testimony of R. Dale Moser.)

worth for 1946, the items which the Government in their Exhibit states the doctor had on hand at the end of that year. You will notice in column two some initials after various amounts. Over on the right-hand side of the page under the title "Legend" you will see the "N. T." represents non-taxable income and a "R." represents reported income which was reported upon the return of the doctor for that year. You will notice that the doctor was able to, from the funds available, to have what the Government alleged he had at the end of 1946 and still have \$2,244.22 available funds on hand.

Q. You mean additional funds over and above what he reported and what he spent and what the net assets had gained? A. That is correct.

Q. I see. In other words, do I understand you correctly that he had a margin of \$2,244.22?

A. That is correct, sir. We could take these items right straight down and I will show you where he got the money, what he spent it for and what he had left.

Q. And that is all based on Government figures, is it? [411]

A. That is based on Government figures. We have to begin, December 31st, 1945, we have cash on hand and in the banks a total amount of \$7,854.09 less the outstanding checks at that date, bringing a net total of \$7,839.99. During the year the doctor received upon the note receivable from Fred Baier, \$2,210.13. This income was non-taxable, it was the result of a prior sale in a prior year in which he

(Testimony of R. Dale Moser.)

had reported the gain when he made the sale. This was merely money which he had not collected on the sale owed to him and he collected during the year. Under E. Norris there is the collection of \$1,200 which is in the same category and James Porter for \$496.38. And further down you will find the item of \$12,818.88 that represents the net proceeds from this property which has been discussed in the trial as the Cable Trust property. That was the amount of net receipts the doctor received for that property and he reported that on his income tax return. The next is a sale on a piece of property, and this is the net amount which he received, and that was reported on the sale on his tax return. The next item is professional income reported, in the amount of 21,947.70. That was the amount the doctor reported on his return. And the amount of rental income, \$2,325. Interest income, \$450.09. Dividends, \$25. The next item is the sale of personal assets, guns and binoculars, which the doctor had; they were sold without profit and are non-taxable. The next is a refund from Mehagians of \$251.12. That was non-taxable. [412] It was not paid during the year 1946; it was from a prior transaction. The next is a collection of a loan to a Mr. Marsh, \$288.12, which was non-taxable. The next is the net proceeds of the Federal Savings and Loan which he made application to borrow, \$12,000; he actually received \$3,000 less the charges upon that loan and he received in the amount of \$2,608.79. And the next item is an insurance recovery from the National

(Testimony of R. Dale Moser.)

Liability Company, \$235, which was likewise non-taxable, making total receipts of \$59,713.18. Now, in order to establish the net worth as alleged by the Government at the end of the year he would have had to have in the bank and on hand at the end of the year the total of \$3,240.30, that is excluding the outstanding checks, would be \$4,069.67 for bank statements, less outstanding checks was \$829.37. He would have had to have a Ford at a cost of \$2,498.02, for which he traded the Ford he had at the beginning of the year plus \$266.02 in cash. He had to have a Cadillac which he paid \$3,386.84. He had to have medical equipment in the amount of \$8,294.28 to which he had to spend \$4,183.94 to add to what he had at the beginning of the year. Then he built a building at 301 West McDowell on which he spent \$21,429.07; and he had landscaping, \$310; paving and grading of Lot 3, Block 2 in the Brill Addition, \$487.95; and what was termed in the Exhibit 33 as remodeling, \$181.54. In addition to that he repaid on the money he borrowed from First Federal Loan \$1,430. He bought \$500 worth of preferred stock in the Clinical Laboratories. [413] He paid professional and rental expenses which he claimed \$19,037.76 less the amount of 2,384.33, which are included in these items which the Government alleged are net worth. So we can't charge the doctor with spending the same money twice. If we are going to charge it as expense in the net worth section we are going to have to eliminate it from the ex-

(Testimony of R. Dale Moser.)

penses he claims. Then we have the amount of personal expenses which the Government alleges he paid by cash, \$4,683.09, and included in that amount is an allowance for \$783.22, representing items which are also included in the 19,000 figure we have up here. Then it was stipulated he had spent \$1,500 in cash rather than check, making a total \$57,468.96. He had funds provided of 59,713.18; he spent and had on hand 57,468.96. So he had additional funds available of \$2,244.22.

Q. All right, Mr. Moser, I wanted one comment from you regarding the two real estate transactions before we go to the next page. That Cable Trust property that I believe the evidence shows was escrowed on April 4th to purchase and on December 20th to sell and possession taken of it on June 15th and prorated the taxes to June 15th, then the other sale to the man from Globe. As an accountant and tax man would you regard those as long-term or short-term gains?

A. I would regard them as long-term gains.

Q. If I recall rightly, Mr. Whitsett chose to regard both of them as short-term gains? [414]

A. I believe that is correct.

Q. Just tell the Jury so that we will understand what difference does it make from a tax point of view whether you regard them as short-term or long-term?

A. Well, a long term gain is for property held more than six months, and the income tax law states that property held for more than six months was

(Testimony of R. Dale Moser.)
taken into income only for fifty per cent of the gain; if it is held less than six months it is taken into income one hundred per cent of the gain.

Q. Then it makes a substantial difference——

A. A substantial difference.

Q. ——as to the amount of income one would owe——

A. That is correct.

Q. ——whether it was a long or short-term gain?

A. That is correct.

Q. Are many of these transactions which you have encountered and which are encountered each day debatable in some respect as to whether they are long-term or short-term?

A. Oh, yes, there are many cases which are debatable, carried to the Supreme Court, some of them.

Q. Now, Mr. Moser, if you will go to the second page of the Exhibit G and will you explain this Exhibit, sir?

A. Yes; this is the same type of Exhibit.

Q. I mean this part of the Exhibit.

A. This is the same type Exhibit we just went through for [415] the year 1946 except this is for the year 1947, starting on December 31st, 1946, and ending on December 31st, 1947. You will notice in addition to the Legend we had on the first Exhibit we have two other items of explanation. Under "1," which is keyed in on the third column to the figure \$1,442.59. That represents the amount which was paid to the First Federal Loan Company to liquidate the liability of \$1,615.85 existing at December

(Testimony of R. Dale Moser.)

31st. That was paid in January of '47 and because of the early payment and the fact he did not draw \$9,000 of the \$12,000 loan which had been granted him they reduced the financing charges to that extent. So to liquidate that \$1,615.85 liability he only was required to pay \$1,442.59. And the second is keyed into the professional and rental expenses claimed. The amounts which he claimed is reduced by the amount of a refund he received from the Western Camera Shop which I believe was introduced by the Government, by the showing of a check which they had paid, making the net amount he paid \$18,663.29. The other items, we started with a net cash, \$3,240.30. He collected the balance of the note of Fred Baier for \$1,189.87, which was non-taxable. He collected \$1,200 from E. Norris, which was non-taxable. He sold his Ford for \$2,000, which he reported on his income tax return. He sold his Cadillac for \$5,750, which he reported on his income tax return. He collected \$29,921.82 from professional fees which he reported on his income tax return. He reported \$5,747.75 from rentals [416] on his income tax return. He reported \$132.53 from interest on his income tax return; and he reported \$25 from dividends on his income tax return. Then he received \$3,500 loan from his wife's mother, which was non-taxable. He received \$1,000 loan from Eddie Basha and repaid that loan. That was likewise a non-taxable transaction. He had an insurance recovery of \$225.60 which was non-taxable. He had the sale of a piano, \$475, which was non-

(Testimony of R. Dale Moser.)

taxable. He had a refund from the Southern Pacific Railroad in the amount of \$210.68, which was non-taxable. Making a total funds available of \$54,618.55 for the year 1947. With that money he had to have on hand at the end of the year, according to the bank statements and the figure of \$500, which is alleged by the Government, a total of \$3,231.10, which we have reduced for outstanding checks in the amount of 575.03, leaving a net cash balance of \$2,656.07. He had to purchase \$965.22 worth of medical equipment to have the balance alleged by the Government of \$9,259.50 at the end of the year. These other items, there were no changes and carried right straight across. He had them at the beginning and he had them at the end. I previously explained that he paid back \$1,000 which he borrowed from Eddie Basha; he purchased a Buick automobile for \$3,950. He purchased a Mercury automobile for \$2,956.84. He purchased stock in the Arizona Country Club for \$500. He purchased a bond in the Arizona Country Club for \$1,000. The next item, \$1,442.59, we previously [417] explained is a liquidation of a liability for a prior year. He purchased Lot 7, Block 2, Tres Palmas, for \$6,414.43. He completed what has been termed in Exhibit 33 as "remodeling" \$1,861.26. He purchased a Lincoln automobile for \$5,420. The personal and rental expenses claimed on his return, a net figure of \$18,663.29 is computed on the right-hand side of the page up there. The personal expenses alleged by the Government which he paid by check, \$6,967.72, and

(Testimony of R. Dale Moser.)

again that is reduced by the figure 1,073.73, which represents items included in professional and rental expenses claimed. It was stipulated that he spent \$1,620 in cash. With the expenditures of that money he purchased the additional net worth assets as alleged by the Government and he had from the end of the year before, he had additional available funds of 5,244.22. We add that to the funds provided for the year, gives us a total of \$56,862.77. We subtract the total expenditures made during the year and he has \$51,837.42. We find he had additional funds available, more than enough to account for his net worth of \$5,025.35 at the end of the second year.

Q. All right, Mr. Moser, if you will turn to 1948 now. Explain that sheet, please.

A. This again is similar to the first Exhibit. We have two or three more explanatory items on the right-hand side. In addition to the non-taxable income and the reported income we have "B.N.T.," which is Believed Non-Taxable Income. And [418] we have "P.T.," which is Partially Taxable Income. Then under the notation "1," which is keyed in on the first column to this figure and on the last column to this figure, represents a Buick automobile he had on hand at the end of the year and which he traded for furniture and which had a value as alleged by the Government at \$1,231.48 of \$3,423.50. That transaction did not represent the exchange of cash in any way.

Starting again with the net cash available we had

(Testimony of R. Dale Moser.)

2,656.07. He collected from Mr. Norris \$1,600.09. He sold the property at East Granada for a net figure to him of \$8,825.01; that was reduced by the amount of 6,361.06. In other words, he collected cash for the difference between 8,825.01 and 6,361.06. The 6,361.06 is then carried over to the net worth column at the end of the year as the amount receivable from that sale from the party who made the purchase. Then we have down here the next item of \$525, which I have indicated as partially taxable income. That represents a redemption of the Clinical Laboratory stock which was called at 105 and he was paid \$525 for his stock which he had originally paid \$500 for. That would represent a capital gain because it had been held over six months and \$12.50 of that should have been reported in income but was not, but the remaining portion, the other \$512.50, was not taxable income. Then he received a loan of \$15,000 from the Northwestern Mutual Life Insurance Company. He reported a rental income, I mean, professional income, of [419] \$37,105.29. He reported a rental income of \$7,735. He reported interest income of \$310.10. He received from an accident policy \$30. And he had a refund from Coles Home Furnishings of \$283.05, which was non-taxable income. That has a total funds available of \$68,081.55. With that money he spent an additional \$768.80 to increase his medical equipment to \$10,028.30 as alleged by the Government at the end of 1948. The item 6,361.06 represents the receivable on the sale of the 1305 East

(Testimony of R. Dale Moser.)

Granada property. The next items are carried over from the first of the year to the last, he had them on hand at the beginning; he had them on hand at the end. Then he paid back to the Northwestern Mutual \$200 on the loan during the balance of the year from the time he borrowed it. He purchased Lots 19 and 20 in the Evans Addition for \$6,670. He purchased the 7th and Maryland property for \$20,017.93, of which he owed \$10,000, so the net amount spent would be \$10,017.93. The next item which goes over to net worth as explained previously is the furniture which he received in exchange for the Buick automobile. He built an addition to his building, \$15,356.42. He invested \$7,000 in Linsenmeyer Investment Trust. He claimed professional and rental expenses of \$21,253.89, of which \$2,912.20 are included in these net worth items above, taken out in order not to charge him twice for the same expenditure. Likewise, as alleged by the Government, he paid \$5,660.61 personal expenses by check. Included [420] in that amount is the sum of \$855.48, which is likewise included in the \$21,000. So that is eliminated to avoid duplication. He also paid, as stipulated, \$1,620 in cash.

At the end of 1948 he had funds provided of \$68,018.55. He had additional funds available from the prior two years of \$5,025.35, making a total of \$73,043.90. Total expenditures were \$70,863.28, making a net additional funds available for the entire period of \$2,180.62 more than was necessary to

(Testimony of R. Dale Moser.)

arrive at the net worth as alleged by the Government.

Q. Now, Mr. Moser, does your net worth computation as reflected by this Exhibit G indicate any unreported income? A. No, it does not.

Q. And I take it that by referring to "additional funds," you mean that he had that much over and above accounting for the increase in his net worth? A. That is correct.

Q. And now, Mr. Moser, did you compute the income tax for the various years?

A. I did not.

Q. Why didn't you?

A. Well, in a net worth case such as this we have shown, where we have shown where there was no unreported income the only question resolves as to a possible disallowance of certain deductions or an adjustment for this purpose or that purpose; that can only be ascertained as to the amount [421] which would be agreed upon by a consultation between the taxpayer and his representative and in taking item by item as to whether they were taxable or not taxable. For that reason I have not computed any tax.

Q. Do you find an unusual number of items claimed as deduction which may be debatable one way or the other?

A. There are quite a few which may be debatable, quite a few.

Q. Is that the customary way to arrive at a solution of that kind, a problem as between the tax-

(Testimony of R. Dale Moser.)

payer and Government, to take them item by item and determine if possible whether they are deductible as a business expense or not?

A. That is by far the most common. I would say ninety-nine per cent of all cases are handled that way.

Q. I assume perhaps this debate about long-term or short-term capital gains is ordinarily handled that way, is it not?

A. That is correct.

Q. Although there is law on that subject?

A. There is law on that subject.

Q. Now, Mr. Moser—and if your Honor please, this is without conceding this is a proper issue in the case. When he asks about depreciation I feel I am forced to do so by virtue of the evidence which has been admitted in the case, although I don't retract from my original position that it was not proper.

Mr. Moser, have you—if you folks want to keep them [422] awhile, fine; if not, you can pass them up here and they will be available for your inspection any time you want them. We will keep them in Court.

Have you prepared a schedule of depreciation?

A. I have.

Q. And will you produce that, please, sir?

(Document handed to counsel.)

Mr. Parker: May this Exhibit be marked for identification?

The Court: At this time, ladies and gentlemen,

(Testimony of R. Dale Moser.)

we will take the afternoon recess for about ten minutes.

(Recess.)

(Defendant's Exhibit H marked for identification.)

Q. (By Mr. Parker): Mr. Moser, before going to the Exhibit which has just been marked——

The Clerk: Defendant's Exhibit H for identification.

Q. ——there are at least a couple of questions I forgot to ask you about the net worth statement. First I wanted to know whether or not in arriving at that net worth statement you made any allowance at all for gifts to clients?

A. No; I did not.

Q. Secondly I would like to know whether or not it is in accord with sound tax accounting practice to charge off a stolen car where the insurance company has refused to pay or denied [423] liability——

Mr. Royston: I object to that as this man's conclusion on a matter of law.

The Court: May I have the question, please?

Mr. Parker: I hadn't finished the question.

Mr. Royston: Excuse me. I withdraw my objection.

Q. (By Mr. Parker): And then upon recovery to report the net recovery as income and pay tax on it?

(Testimony of R. Dale Moser.)

Mr. Royston: Then I make the objection as stated before.

The Court: Objection sustained as to that.

Q. (By Mr. Parker): I will put this question to you, Mr. Moser: In the course of your audit did you find that Dr. Lutfy did recover a judgment against the insurance company arising out of the theft of that Lincoln Continental automobile?

A. I did.

Q. And did you find in the course of your audit that upon recovering that judgment for the theft of that automobile reported it as income at a later——

Mr. Royston: I object—maybe I interrupted too soon again.

Q. (Continuing): ——on a tax return for the year on which he made the recovery?

Mr. Royston: I object unless the year is given. If they give the year then I have no objection.

Mr. Parker: I am not absolute as to the year. What year was it that he reported—— [424]

A. The year 1950.

Mr. Parker: Does that satisfy your objection?

Mr. Royston: Yes, sir.

Q. (By Mr. Parker): Did he report it as income and pay tax on the recovery for that stolen automobile in the year 1950? A. He did.

Q. Is there anything unusual from an accounting point of view about his charging off when stolen and reporting it back as income when he recovered on it? Is that objectionable to you?

(Testimony of R. Dale Moser.)

Mr. Roylston: I object to that on the ground it is calling for a conclusion of this witness.

Mr. Parker: I submit the witness is an expert.

The Court: He may answer that.

Q. (By Mr. Parker): Is there anything unusual about that?

A. Under the particular circumstances, no.

Q. Mr. Moser, directing your attention to defendant's Exhibit H for identification, what is this?

A. This is a schedule of fixed assets and depreciation for the three separate pages for the calendar years 1946, 1947 and 1948.

Q. And did you prepare that? A. I did.

Q. And from what source did you derive your base figures [425] for computing depreciation?

A. From the Government's allegations as contained in Exhibit 33.

Mr. Parker: I offer the Exhibit in evidence subject to the explanation I am going to ask the witness for.

Mr. Roylston: No objection.

The Court: It may be admitted.

(Defendant's Exhibit H marked in evidence.)

Q. (By Mr. Parker): Mr. Moser, do you have copies for the Jury, the Judge and counsel?

A. Yes, I do.

Q. Mr. Moser, before going into a discussion of Exhibit H and the figures on it I want to ask you to explain briefly to the Jury what this depreciation business is?

(Testimony of R. Dale Moser.)

A. Depreciation is the wasting away of a capital asset. It may be an automobile or a building. It wastes away and deteriorates over time and use. That is a short definition.

Q. Is that a proper deduction for income tax purposes?

A. Yes, sir; it is stated in the Code it is proper to make a deduction for depreciation.

Q. Is there any particular method specified in the Internal Revenue Code for figuring depreciation?

A. No. The regulations state that the capital sum may be determined over equal annual installments or any other commonly accepted method such as production hours method. [426]

Q. I see. Now, Mr. Moser, I observe from Exhibit H that you have a column, "Estimated Life Years"; what does that mean?

A. That means the estimated life at which that asset will have a useful value.

Q. You have a column called "Straight Line Depreciation"; what is that?

A. Straight line depreciation is the method most commonly used for the principal reason it is most commonly used is because of its simplicity, that is a straight deduction of an equal annual amount.

Q. Can you give us an example, just a hypothetical example to illustrate that?

A. We will take an automobile which has a life of four years; you take one-fourth of the cost of the automobile in each year.

(Testimony of R. Dale Moser.)

Q. We are assuming you are using that automobile in your business? A. That is correct.

Q. In other words, you deduct each year for depreciation twenty-five per cent of the cost of that automobile? A. That is correct.

Q. Now, you have a column here called the "Sum of the Digits Depreciation," and is that capable of being explained or not?

A. I believe it can be explained. It is a little bit [427] more technical than the straight line. Sum of the digits method is used by many businesses because they want to equalize the cost of that particular asset over its life rather than recover its cost. By that I mean the asset, such as an automobile, as we all know, depreciates in value to a greater extent the first year and each succeeding year the depreciation is less on a resale value, on the replacement value of that particular asset. Again, an asset which is new requires far less repairs than an asset which is old. The older the asset the more repairs; and by this method the business is able to more equally equalize the cost of using that asset through depreciation and repairs over the entire life.

Q. Are both of these methods of computing depreciation, both the straight line and the sum of the digits, are both of those standard, accepted, widely used methods of computing depreciation?

A. They are.

Q. You are aware there has been recently a complete revision of the income tax laws?

(Testimony of R. Dale Moser.)

A. Yes.

Q. And with respect to depreciation a liberalization of especially the first few years?

A. That is correct.

Q. Do I understand correctly this sum of the digits is on the same principal it allows more depreciation for the early [428] life of the asset?

A. That is correct. I can explain that a little more fully if it is agreeable to both counsel.

Q. It is agreeable with me.

Mr. Royston: That is all right with me.

Mr. Parker: I am sure Mr. Royston will stop you if it becomes disagreeable.

A. In the sum of the digits method, we will take a simple four-year asset. Take for each year, first year one and second year two, third year three and fourth year four. You add those up, which comes to the total of ten. In depreciating you use that ten as the denominator and the numerator would be the year you are taking in reverse. In other words, the first year instead of taking one-tenth of the cost you take four-tenths of the cost; the second year you take three-tenths of the cost and the third year you take two-tenths of and the last year one-tenth of the cost. That is a simple illustration of what the sum of the digits method is. That method has been allowed in income tax deductions. The regulations do not state any limitation. However, the Bureau has a rule of thumb in coming to an agreement in differences of opinion;

(Testimony of R. Dale Moser.)

has used a figure of one hundred fifty per cent of straight line depreciation, they would accept up to one hundred fifty per cent, but not over one hundred fifty per cent. Under the new law it is definitely stated in the new law they [429] will accept up to two hundred per cent.

Q. Is this sum of the digits method of computing depreciation, is that regularly accepted by the Bureau of Internal Revenue? A. Oh, yes.

Q. All right now, Mr. Moser, I guess that takes care of the preliminaries as best I can do it. Will you now turn to this Exhibit H and I believe you said your cost figures here, you accepted the Government's contentions? A. That is correct.

Q. Accepted their figures?

A. That is correct.

Q. You are not at the moment quarreling with those figures? A. Not at this time.

Q. All right. Will you explain your—

A. We have taken the cost, the date acquired, then the cost, the estimated life of the asset, then we have shown for the purposes of allowances a straight line depreciation on that asset by dividing it equally among the years of the estimated life of the asset. Then we have shown the depreciation under the sum of the digits method, which we take the inverse year first. On the next column the allowable depreciation where the sum of the digits depreciation exceeds one hundred fifty per cent of the straight line depreciation we have taken one hundred fifty per cent of the straight line [430] depreciation

(Testimony of R. Dale Moser.)

which is you might call a rule of the thumb of the Revenue Department they are allowing. Under that method you will notice that the depreciation for the buildings and the furniture, buildings, \$1,610.08; the furniture, \$1,048.98. Then we come to the automobiles. We have a total allowable depreciation of \$855.63. However, at that time the doctor had only one automobile at the time and we took only eighty per cent of the allowable depreciation in that year based upon Mr. Whitsett's testimony as to his computation in allowing in his reserve. We come to a total of allowable depreciation of \$3,335.56 which the doctor could have claimed on his return, and he actually claimed \$3,215. In other words, he could have claimed \$120.56 more depreciation than he actually did and still would have been allowable by the Government.

Q. There was one point I wanted to ask you about. As I recall, Dr. Lutfy, in computing depreciation on his return on the office building took a two per cent rate, do you remember that?

A. That is correct, he did.

Q. Is a two per cent rate on a building—I assume you have seen the building?

A. I have.

Q. You know its general characteristics. Is a two per cent rate on that type building an adequate depreciation in your judgment? [431]

Mr. Royston: I object——

Mr. Parker: Well——

Mr. Royston: It is a matter what the taxpayer

(Testimony of R. Dale Moser.)

claimed as the life of the building and that is already in evidence. Whether it is adequate or not is just this man's opinion and that is not what he is an expert in.

Mr. Parker: I will withdraw the question if counsel finds it objectionable.

Q. (By Mr. Parker): In other words, the result of your computation in accordance with these standards which you have described, and taking the gentleman's own figures for it——

A. May I state, Mr. Parker, why I used this life years in my computation?

Q. Yes.

A. Would that be objectionable, Mr. Roylston?

Mr. Parker: I don't think so. Will you state that, Mr. Moser?

Mr. Roylston: First, I haven't followed—it seems to me now he has changed the life expectancy of the property which the taxpayer had a different life expectancy listed. If that is what it amounted to, of course, I object to that.

The Court: He has offered now to explain why he used the basis he has.

Mr. Roylston: Which I think he said was a different basis than what the taxpayer used. [432]

The Court: It might be.

Mr. Parker: Mr. Whitsett's was different, too.

Mr. Roylston: No; the Government used the same basis on the depreciation, as I understand it. Go ahead, maybe I don't understand enough of

(Testimony of R. Dale Moser.)

what he is talking about. I will withdraw that objection.

The Witness: There has been changes made in buildings and improvements over what was reported on the return for automobiles. Automobiles were changed because of the fact four years is the usual life used in most cases. There are many more cases I believe used in three-year life than five. I believe the doctor claimed five, but I believe three is more equitable life to use on an automobile and I think you will find it is the most usual figure used. The items of the building have been changed because in the first week of June of this year at my office in conference with Mr. Tucker, Mr. Whitsett and Mr. Calkins, we discussed this matter quite thoroughly and the four of us agreed the term of twenty years should be equitable for these buildings. That is the reason I used that figure.

Q. All right, Mr. Moser, will you go to the second page of the Exhibit H?

A. The second page again similar to the first page of the Exhibit. I think it will be necessary to go through item by item but only to show the amount allowable of building, [433] \$2,485.71. For furniture and fixtures, 1,353.20. For automobiles, 1,165.84. And you will notice in that computation that eighty per cent of the Ford was used a portion of the time and the Mercury was not used at all, using only the full amount when he had more than one car. And the total of that figure for automobiles is \$1,165.84. Making a total allowable deprecia-

(Testimony of R. Dale Moser.)

tion of \$5,004.75. And the doctor claimed on his return \$3,702.50. In other words, he could have claimed 1,302, \$1,302.25 more than he actually claimed.

Q. Will you do the same for the third page?

A. On the third page for the calendar year 1948 we have the same type of Exhibit which shows \$3,131.36 allowable for buildings. \$1,486.08 allowable for furniture and fixtures and equipment; and \$1,162.24 allowable for automobiles. Making a total allowable of \$5,779.68. And the doctor claimed on his return \$4,442.88. He could have claimed an additional \$1,331.80 more than he actually claimed on his return.

Q. In other words, if I understand you correctly, in each of the three years the depreciation which he claimed on his return as a deduction was substantially less than the allowable depreciation which he could have claimed and received a deduction and credit for?

A. That is correct.

Q. And in '47 and '48 those two years lumped together amounted to over \$2,600 in those [434] years?

A. I believe that would be so.

Q. All right, Mr. Moser, I think that is all the questions I have about that matter. Now, Mr. Moser, a few general questions here. In connection with your examination of Dr. Lutfy's records did you undertake to get some idea of the number of transactions involving cash or charge that went through his office each year as disclosed by the daily doctor's daily log books that you examined?

(Testimony of R. Dale Moser.)

A. Yes, I did.

Q. And what kind of transactions were you particularly interested in ascertaining?

A. In the number of transactions in which he received cash either as cash payment for a call or received on account.

Q. First I will ask you before you give that number, have you found, as a matter of experience as an accountant, that inadvertencies or errors or mistakes bear some relationship to the total number of transactions involved? A. Yes, I have.

Q. How many cash transactions did you find recorded there for 1946?

A. 1946, I found there were 2,382 cash transactions.

Q. 2,382? A. That is correct.

Q. And for '47?

A. Found there was 2,955 cash [435] transactions.

Q. 2,955, and 1,948? A. 3,891.

Q. You remember Mrs. Raye Way, the wife of the Justice of the Peace at Williams who testified here as a witness? A. Yes.

Q. I believe she testified she went to work for Dr. Lutfy the day after Labor Day of 1947?

A. That is correct.

Q. And worked for him until the Spring of '49?

A. That is right.

Q. Did you find any improvement in the overall accuracy of the records as between the period before she came to work as compared with after

(Testimony of R. Dale Moser.)

she came to work? A. Yes, I did.

Q. And was it better or more complete and accurate after Mrs. Way?

A. It was more accurate after she came to work.

Q. Now, Mr. Moser, in the course of this period of time that you have been engaged in this matter have you had occasion to confer more than once with Mr. Tucker, Mr. Whitsett, Mr. Cass or other members of the Internal Revenue Department?

A. Yes, I have.

Q. Can you tell the Jury in a general way about how often such conferences occurred or describe them or give us some idea how much time you have spent with them? [436]

A. Well, the first conference I had with either of the gentlemen mentioned was right at the end of 1951 or the first part of 1952; it was a conference with Mr. Cass in the Judicial Department at his Los Angeles office. Dr. Lutfy and myself and Mr. Treadaway from our firm and Mr. Cass were the men present at that particular conference. After coming back to Phoenix, I had a conference with Mr. Tucker, I believe was there, and Mr. Whitsett, which we discussed the case and certain information was given them which had been requested by Mr. Cass at the previous conference.

Q. By the way, if I may interrupt at this point, during the period of these conferences did you have a substantial part of Dr. Lutfy's records in your possession? A. Yes, I did.

Q. And did you at all of these conferences give

(Testimony of R. Dale Moser.)

these gentlemen all of the information you were able to find and which they requested?

A. Yes, I did.

Q. Did you at any time ever try to withhold from them any information or any document or any record or any cancelled check or any other part of Dr. Lutfy's records?

A. No, I did not.

Q. And did you at all of these conferences where these matters were discussed discuss freely and accurately the matters which were under [437] consideration?

A. Yes, I did.

Q. State whether or not it is true that after I came into the case that I advised you to continue to do that?

A. Yes, you did.

Q. I don't remember just where we were when we left off——

A. I believe at that time I just said we had a conference with Mr. Whitsett and Mr. Tucker after our first interview with Mr. Cass. I then had another interview in January, 1952, with Mr. Cass in Los Angeles. The next interview I had was with Mr. Whitsett and Mr. Tucker and Mr. Calkins in June of this year, which I believe occupied a good portion of two or three days at different times when they would come in and spend two or three hours at a time I believe on three successive days, possibly only two. I wouldn't swear to that. I believe Mr. Tucker was not present except on one occasion, is that right, Mr. Tucker?

Mr. Royston: Yes, that is right.

(Testimony of R. Dale Moser.)

The Witness: That is the conferences I have had as far as I can recollect them.

Q. (By Mr. Parker): When you went to Los Angeles, when did you say you and Dr. Lutfy made the trip over there?

A. The first trip when Dr. Lutfy went with me it was either the latter part of December, 1951, or the first part of January.

Q. And did you have some sort of hearing? [438]

A. Yes; we had a preliminary hearing at the Judicial Department.

Q. Who conducted this? A. Mr. Cass.

Q. And that gentleman, I believe, has been identified as the Regional Attorney at Los Angeles?

A. I believe that is correct.

Q. Did Dr. Lutfy answer all of his questions?

A. Yes, he did.

Q. And did you supply information to him?

A. Yes, I did.

Q. Did you take the records over there?

A. Yes; we took almost all of his records there.

Q. At the conclusion of that hearing did Mr. Cass express an opinion about what he thought of this case as——

Mr. Royston: Well, I am going to object to that. I don't have any idea what it is, but I object to it.

The Court: Objection sustained.

Mr. Parker: I am sorry Mr. Royston objected, but I suppose it is objectionable.

Mr. Royston: I still haven't followed all this

(Testimony of R. Dale Moser.)

hearing, whatever he is talking about. I think it should be made clear it had nothing to do with this action here. It has been referred to as a preliminary hearing.

The Court: I sustained your objection, Mr. [439] Roylston.

Mr. Parker: I would be delighted to tell him all about it.

Mr. Roylston: I was confused. I thought he called it a preliminary hearing. I just thought if it wasn't a preliminary hearing maybe all of it is subject to being stricken. I thought for awhile this was a preliminary hearing in this case. Of course I wasn't at a preliminary hearing either. I don't know whether there was or not.

Mr. Parker: It wasn't a particular part of this proceedings in this Court.

Mr. Roylston: I will withdraw that objection. You can go on.

Mr. Parker: You want him to go ahead and tell about that?

Mr. Roylston: I don't care. If it wasn't a preliminary hearing in this case I don't think it is relevant.

The Court: Where we are right now you made an objection to one question and I sustained it.

Mr. Roylston: All right, sir.

Mr. Parker: Do I understand counsel withdraws the objection?

Mr. Roylston: He ruled on it.

(Testimony of R. Dale Moser.)

Mr. Parker: Did I understand you to say to go ahead?

Mr. Royston: Go ahead, whatever you want to do.

Mr. Parker: Have him tell about it? [440]

Mr. Royston: If it is not a preliminary hearing in this case I am objecting to anything further concerning that. I thought for awhile it was a preliminary hearing, evidently it wasn't a preliminary hearing, it was some conference over on the Coast.

Mr. Parker: We will forebear.

Q. (By Mr. Parker): Mr. Moser, in the course of checking and auditing Dr. Lutfy's books and records, his bank accounts, his deposits, his expenditures, did you find at any time any concealed bank accounts? A. No, I did not.

Q. Did you find any bank accounts belonging to him or his wife in any fictitious name other than the nickname Tiny Lutfy? A. I did.

Q. How was that, sir? A. I did.

Q. Which is that?

A. Phoenix Sports Shop.

Q. You audited that account?

A. I examined it, I didn't audit.

Q. That was the account of 500 that eventually played out to \$35 and was closed?

A. That is correct.

Q. Did you find at any point anything to indicate any [441] desire to hide any money or property or assets from the Government?

A. No, I did not.

(Testimony of R. Dale Moser.)

Q. Did you find any indication of any disposition to keep a double set of books?

A. No, I did not.

Q. Did you find any indication of any transactions recorded in any code or any false description of it?

Mr. Royston: If it please the Court, the Government hasn't alleged any of these items of misconduct such as double books or coded documents. There has been no allegation of anything along that line was kept by the taxpayer.

Mr. Parker: If your Honor please, we are charged with a pretty serious offense of wilfulness and intent is a part of one of the essential elements which the Government has to prove and I feel we should not be limited.

The Court: I will permit him to answer this question.

(The last question was read.)

A. No, I did not.

Q. As far as your observation of these conferences at which Dr. Lutfy and yourself had with the various members of the Internal Revenue Department, did Dr. Lutfy co-operate with them and undertake to supply them with what they asked for?

A. In every way.

Q. Now, Mr. Moser, there was introduced by the Government [442] here an application for a loan from the Northwestern Mutual Life Insurance Company. Exhibit 32, was it?

(Testimony of R. Dale Moser.)

Mr. Royston: I believe so.

Q. Government's Exhibit 32 in evidence, I show that to you and direct your attention to the line there that says, "From salary, professional fees, per month, \$1,665 net." A. Yes, sir.

Q. Did you observe that? A. Yes, I do.

Q. That application I think was dated—what date was it dated?

A. It was dated the 26th day of May, 1948.

Q. Are you able to tell the Court and Jury how far off that is from the actual income?

A. I believe I can explain that to them. This application states that he estimates his professional fees, his income from professional fees to be \$1,665 per month.

Mr. Royston: I object to the witness inserting the word "estimate." There is no such word as "estimate" there. It calls for monthly salary——

Mr. Parker: I believe there was testimony from the Government's witness it was an estimate.

Mr. Royston: This witness purportedly was reading from the document.

The Court: The Exhibit itself should be [443] read.

Q. (By Mr. Parker): Whatever the Exhibit says, Mr. Moser.

A. The portion says: "My income is as follows: From salary, professional fees, \$1,665 per month net." \$1,665 per month net would be a total for the year, for twelve months, \$19,980. The doctor reported on his income tax return for the year 1948,

(Testimony of R. Dale Moser.)

the sum, gross income of \$37,105.29 and a net income of \$16,927.37. Now, to this net income we must add back the non-cash expenditures of depreciation of \$3,600 which brings a return, net return for that year as reported on his tax return of \$20,527.37, almost \$600 more than the amount which he showed on his appraisal.

Q. Thank you, Mr. Moser. Now, Mr. Moser, in auditing the doctor's books and records, did you find charges from Coulter's? A. Yes, I did.

Q. What is the name of that firm?

A. The name? Q. Yes.

A. It is Coulter's. It is an automobile firm in Phoenix.

Q. It is Coulter Motor Company?

A. Coulter Motor Company.

Q. Commonly referred to as Coulter's?

A. That is correct.

Q. I will ask you whether or not the doctor had his cars, car or cars, at least partially maintained at Coulter's? [444] A. Yes, he did.

Q. There is a check that has been talked about to some extent in the amount of \$283.05. Is that the check? A. That is the check.

Mr. Parker: May this be marked for identification?

(Defendant's Exhibit I marked for identification.)

Mr. Parker: Do you have any objection of it being offered in evidence?

(Testimony of R. Dale Moser.)

Mr. Royston: No objection.

The Court: It may be admitted.

(Defendant's Exhibit I marked in evidence.)

Q. (By Mr. Parker): Now, Mr. Moser, do you remember if there were checks to Coulter's?

A. Yes, there was.

Q. Now, this particular check was charged to what?

A. This particular check was charged to automobile expense.

Q. And the check as disclosed by the endorsement was actually paid to whom?

A. Coles Home Furnishings.

Q. According to your investigation of the books, if this had been Coulter's, it would be in all likelihood have been what?

A. A repair bill at Coulter's Garage, Coulter Motor Company.

Q. (By Mr. Parker): Would the Jury like to pass this Exhibit among you? [445]

Q. (By Mr. Parker): There is one other question I would like to ask you and that is whether or not on a check such as this it would make any difference at all income-tax-wise if the merchandise was returned and the amount refunded at a later date, or from a net worth point of view?

A. No, it would not from a net worth point of view.

Q. There was a stipulation here regarding pay-

(Testimony of R. Dale Moser.)

ment of some small sums to the Arizona Country Club? A. That is correct.

Q. Mr. Moser, do you happen to belong to that club, which has been described as a "poor man's country club"? A. Yes, I do.

Q. Do you consider that an apt description?

A. I think it is fairly apt, yes.

Q. Mr. Moser, what is the customary practice with respect to how dues of that character are treated for income tax purposes?

A. I believe in the great majority of cases they are taken as a business expense.

Q. Now, in your own firm, how are your dues handled?

A. My firm pays my dues and take it as an expense.

Mr. Royston: I object. The difference between a physician spending it for his business and an accounting firm spending it for their business, because an accounting firm might claim it as an expenditure doesn't necessarily mean it is [446] a regular business expense for a physician. In other words, if an accounting firm goes on the golf course to find their clients it is one thing; if a doctor goes there to find his clients it is altogether different.

Mr. Parker: May I make this comment, your Honor. There is a terrific difference. A doctor or lawyer can't advertise; an accounting firm can. The only way a doctor or lawyer can stimulate business is such means as this. So there is a much stronger reason why a doctor or lawyer should be able to

(Testimony of R. Dale Moser.)

legitimately take that kind of a deduction than there is even in the case of an accounting or business firm.

The Court: There have been some observations made but there has been no objection.

Mr. Roylston: I was objecting to any further testimony how this man claims his country club membership as an accountant, because it doesn't tend to prove anything about the doctor.

The Court: The objection will be overruled.

Q. (By Mr. Parker): Mr. Moser, did Dr. Lutfy claim the country club dues? A. Yes, he did.

Q. And was that, in your opinion, in accordance with sound tax accounting practice?

A. Yes, it was. [447]

* * *

Cross-Examination

By Mr. Roylston:

Mr. Roylston: If it please the Court, I am passing out these copies of defendant's Exhibit G to the Jury, which are the same ones we talked about yesterday.

Q. (By Mr. Roylston): Referring to this defendant's Exhibit G, Mr. Moser, the first item I want to question you about is on the 1945 through 1946 sheet, that is the first sheet on the Exhibit?

A. Yes, sir.

Q. And under the column Funds Available as Alleged and Reported, there is an item about half way down the column that shows \$12,818.88. I

(Testimony of R. Dale Moser.)

wonder if you would explain that [452] particular item?

A. That item is the net proceeds received by the doctor on the sale of the property known as the Cable Trust property.

Q. Now, would you divide that up into what is principal and interest on that amount, do you have that figure available?

A. No, I don't have that figure available. That is the sales price. That does not include any interest, as I recall.

Q. Wasn't the receipt price from that particular piece of property \$12,520.33?

A. I believe there was a small item prior to the main item which amounted to, brought the total to \$12,818.88.

Q. Do you know what that item would have been?

A. I could go back through my work papers and determine. The sales price was \$40,000, which one-third of it would have been \$15,330, less the cost of sales, bringing \$12,818.88.

Q. That prior item, would that have been expenses?

A. Possibly would be part of the earnest money, I am not sure.

Q. Do you have your work sheet here?

A. I don't have a recap of all those deposits here. I have it, I believe, at the hotel.

Q. According to the information which we have

(Testimony of R. Dale Moser.)

the purchase price, as far as Dr. Lutfy's share is concerned, is \$12,520.33?

A. The escrow statement that I saw I believe the price I computed his share to be \$12,818.88. There might be a [453] difference of what was expense and what was part of the price between your interpretation and mine; I believe that would be it.

Q. You think you could find that later in your work papers? A. I believe so.

Q. In that same column on down a few items further in the column you have an item of \$251.12 which is listed as a refund from Mehagians?

A. Yes, I put that in because he did receive a check from Mehagians in that amount. And I searched his expenses claim for 1951 and his check records and I could not find where he had paid out of his funds available in that period the amount of \$251.12. It must have come from some other period, a prior period. It was the first part of the year in which he received that refund.

Q. This Mehagians refund I believe was on November 6th of 1946. Can you check your records for that?

A. I can check them. I don't have them in the courtroom; I can check them.

Mr. Royston: If it please the Court, probably all this examination is kind of a waste of time if we don't have the records to go into, I will have to go back over it later.

The Witness: Yes, I believe that was October that particular deposit was made, but there was one

(Testimony of R. Dale Moser.)

check written— [454] I could ascertain any expenditures made from his personal funds by check.

Q. (By Mr. Royston): Let me ask you this question, Mr. Moser. If this refund which was received during 1946 was listed in this second column as funds available, if the expenditure had been made during 1946 shouldn't that have been listed under the third column?

A. That is correct, but as I stated, I have listed all the expenditures for the year and I do not find that expenditure for that year. That is the reason I quoted it there.

Q. This Mehagians, that is a furniture store there in Phoenix? A. That is correct.

Q. Isn't it highly unlikely if the expenditure hadn't been made in '46 that Dr. Lutfy could not have held this particular item for a period of some years and returned it for refund?

A. It could be or could be a return of merchandise at a used price, that I do not know. All I know I cannot find any records among his checks for the year 1946 in which he paid that amount in '46. I can't call it an expenditure when I can't find a check for it.

Q. You listed this in funds available and still did not put it under expenditures?

A. That is right because I found it under funds available [455] but I did not find it under funds expended.

Q. The way it is listed here it is to the taxpayer's advantage, Dr. Lutfy's advantage, is that

(Testimony of R. Dale Moser.)

correct? A. That is correct.

Q. Just the next item down, collection of loan—Marsh, you have got \$288.12. Now, that collection of that loan was in November, 1946, is that correct?

A. I will check with you. I think I have that here. Yes, that was November, 1946.

Q. On your work sheet do you have the date that loan was made?

A. No, I do not. I could not find any indication that any money had been expended for that purpose.

Q. So if that loan was made during the year 1946 it should have shown under the expenditure column, the third column?

A. That is correct. But it was not in, as far as I could determine, in the expenditures for that period. I also find in connection with that there was some small payments made by Marsh in April and in—the total amounted to \$288.12, so there were some payments made through the year. One payment I see here made in April.

Q. Well, now this particular item being listed in the second column and if the expenditure was made in the same year you state you have no evidence to state when the expenditure [456] was made?

A. That is correct, I cannot find there was any expenditure made during the year for that particular item.

Q. The manner in which that item is listed is also to the taxpayer's advantage?

(Testimony of R. Dale Moser.)

A. That is correct. Those were funds which were available.

Q. Now, in that same column, skipping back up a couple of lines, there is an item \$766.26?

A. Yes, sir.

Q. Listed as Sale of Personal Assets?

A. That is correct.

Q. Now, included in that amount did you find a figure of \$250 for the sale of a rifle and telescope on February 25th, 1946?

A. Yes, I did. I believe I will have to check, but I did find the items which comprised that. What was the amount that you had?

Q. \$250 for the rifle and telescope, on February 25th, 1946. A. Yes, I did find that.

Q. And for the sale of a shotgun for \$125 on March 27th of 1946, making the total of \$375?

A. That is correct.

Q. Now, does your records show when Dr. Lutfy made the expenditure for those particular items? [457]

A. Not identified by items, but the expenditures he made in 1946 for guns are included in the expenditures in the third column, so it would make no difference. We have charged him with expenditures for all the guns he purchased during that year and we are taking the funds available, the amount he received for those guns.

Q. Where is that item in the third column?

A. It is included either in the item of professional business expenses or in personal expenses by

(Testimony of R. Dale Moser.)

check. If he spent any money for the gun that he sold it would be in that item, in either one of those two items.

Q. Did you find a personal check or personal expense by check to cover those two items? Did you find that in the records anywhere?

A. I found he had purchased some guns, not necessarily guns, but scopes. I don't know whether he purchased these two items or not. I could not identify what he sold with what he purchased, no.

Q. You didn't find checks to cover these two specific items? A. Not specific items.

Q. The manner in which that is listed as funds available, then being unable to place it under the third column, is that to the taxpayer's advantage?

A. I do not think so because all the funds which he has [458] paid out during the year, if he purchased these guns during the year they are included in the expenditures.

Q. Business expenditures?

A. Or personal.

Q. I believe you stated you did not find a check to cover them under personal expenditures?

A. I could not identify any particular gun which he might have sold by check which he wrote. I stated that the expenditures he made during 1946 for any guns or anything of that type are included in the total expenditures which are charged against the doctor in this Exhibit.

Q. What was the total amount of those guns and rifle expenditures, according to your computation?

(Testimony of R. Dale Moser.)

A. I have not computed that.

Q. All right, sir, now moving over into this column Expenditures as Alleged and Claimed Plus Cash End of Year, the third column on this same page?

A. Yes, sir.

Q. Going down to the item almost to the bottom of the page, the first item in parentheses, \$2,384.33, would you explain again just what that particular item is?

A. That particular item consists of items, several items, which it was alleged upon the Government's net worth statement were capital items which had been included in the expenses.

Q. This particular column also refers to the items as [459] claimed on Dr. Lutfy's returns, do they not?

A. That is correct.

Q. You say that is correct?

A. That is correct.

Q. Now, Mr. Moser, isn't it true that this amount of \$2,384.33 was included according to Dr. Lutfy's returns in this item of \$19,037.76 which is listed as Professional and Rental Expenses Claimed?

A. That is correct.

Q. Isn't it true according to Dr. Lutfy's return this same item of \$2,384.33 was listed up higher or was included up higher in this same column under capital assets as depreciation?

A. No, that item was not as an item included.

Q. Well now, examine this '48 return, Mr. Moser, Government's Exhibit 5, and turn to the

(Testimony of R. Dale Moser.)

depreciation schedule in that particular return and locate the claimed expenditures for capitalized items?

A. Claimed expenditures for capitalized items are not included in this return.

Q. What was the cost basis which Dr. Lutfy claimed for the items purchased in 1946?

A. A round figure in each instance with the exception of furniture on the bottom line, was a round figure to the thousands of dollars, did not include the list of any items at all. [460]

Q. Read the figures which were included off of that return.

A. Medical equipment, \$13,000; X-ray equipment, \$7,000; clinical photo equipment, \$2,000; Mercury Convertible, \$3,000; office building, \$30,000; additional office, \$20,000; frame stucco, \$5,500; brick stucco house, \$5,000; additional remodeling, \$5,000; concrete block duplex, \$20,000; furniture, \$3,357.50.

Q. According to that return those particular amounts were claimed by the doctor for the purposes of depreciation, weren't they?

A. These amounts here were claimed.

Q. Those amounts there. Wouldn't that necessarily include that figure of \$2,384.33?

A. Not necessarily. Some of the items included in there are some of the items which are alleged by the Government to be capital expenditures which are not necessarily capital expenditures. That could only be determined upon an examination of each item.

(Testimony of R. Dale Moser.)

Q. According to the return wasn't Dr. Lutfy claiming them at a cost of even more than what the Government was stating?

A. That I can't say. He has a net figure here. He has not itemized the items. I do not know what he claimed any specific item for which you are speaking about now. [461]

Q. The total assets, weren't the total assets claimed at a greater figure than the amount stipulated to?

A. I don't believe there was an amount stipulated, I believe there was an amount alleged in which we have used your figures, but I don't believe they were stipulated to.

Q. Weren't there stipulations as to the individual assets?

A. Certain individual assets, yes.

Q. Didn't those stipulations include these particular pieces of property?

A. Certain pieces of property, yes.

Q. Didn't it include all of those pieces of property claimed there?

A. The pieces of property, yes, it included the purchase price of the property.

Q. Didn't Dr. Lutfy for the purposes of depreciation list the cost of the properties in excess of the amounts which now have been stipulated to?

A. Yes, he did.

Q. Well, then wouldn't that necessarily include this figure of \$2,384.33?

A. Again I will have to say not necessarily.

(Testimony of R. Dale Moser.)

Q. You say not necessarily. Does it or doesn't it?

A. I say not necessarily. I cannot say what the doctor had in his mind because there is no computation. I say the expense items which you claim are capital assets, I assume he [462] did not include those in these figures. As I stated, these figures are round figures, \$20,000, \$5,000, which are listed on the return.

Q. Wasn't it by the use of this figure \$2,383.33 that you finally agreed to stipulate to these amounts which are up here higher in the column?

A. We stipulated to the fact that he spent that money; we didn't stipulate to the fact that was in addition to capital assets. We stipulated he spent those definite amounts and we could not include the expenditure twice from the doctor's records.

Q. Mr. Moser, don't you know for a fact that according to the doctor's returns that item of \$2,384.33 was claimed under the depreciation schedule and was also claimed under business expenses, and that in your computation you included it only once, which makes it balance out, isn't that correct?

A. I included it in my computation—I think if we want to go to the depreciation schedule we could explain this matter a little better, which will probably come later. I have included in my computation here only the expenditures made. I am not including in this computation here whether the expenditures were personal, professional expenses or whether they were capital assets. I have used them as capital assets in order to agree with

(Testimony of R. Dale Moser.)

the information as presented by your schedule which you presented in Court in order to tie [463] into your figures. I cannot charge the doctor with an expenditure for capital asset and again charge him with an expenditure for an expense.

Q. That is the point I am getting at. According to accounting procedure you can't do that, but according to those returns that is exactly what Dr. Lutfy did, isn't that correct?

A. Again I will have to say I do not know whether the doctor included in his computation of arriving at this price those figures or whether he did not, because there is no evidence available to that fact.

Q. You know this is the way it should have been done, the way you did it?

A. No, I would not say that is entirely correct. I would not say all those items are capital items. I will not agree to that.

Q. Are part of them capital items?

A. A part of them should be capital items.

Q. So if they are capital items and they are included up there as capital items by Dr. Lutfy and if they are also claimed as a business expenditure, doesn't that amount to a double deduction?

A. They are not included up there by Dr. Lutfy. That is my computation to agree with your expenditure. I do not know what the doctor had in mind when he included these.

Q. That is the point I am getting at. According to your [464] figures they are not included up

(Testimony of R. Dale Moser.)

there, but according to the doctor's computation they were, so according to your figures you are claiming a single deduction; according to Dr. Lutfy's return he is claiming a double deduction, isn't that what it amounts to?

A. I cannot say that is a true statement.

Q. You can't say it is an untrue statement?

A. I can only say I do not know what the doctor included in these figures. There is no computation available to show what he included to arrive at these figures. I do not know if these items are in there or if they are not in there.

Q. Then why did you take them out, Mr. Moser?

A. I took them out because those are the items which you alleged were capital expenditures.

Q. You stipulated that this was these same figures of capital assets?

A. We stipulated that the amounts were spent to the people in all of these instances. We do not stipulate they were capital expenditures or personal expenses or business expenses. We stipulated that they were——

Q. So, in other words, you tried to stipulate they were and weren't both in the same stipulation?

A. Oh, no.

Mr. Parker: If your Honor please, that is argumentative. The stipulations are in evidence. [465]

The Court: The stipulation will show what is stipulated.

Mr. Parker: I made the stipulation, not the witness.

(Testimony of R. Dale Moser.)

Q. (By Mr. Roylston): This next item down here of \$783.22, the same thing applies to that as we have been discussing of this item of \$2,384.33, isn't that correct? A. That is correct.

Q. It amounts to exactly the same thing we have been discussing?

A. Same thing. I will have to qualify that a little bit, Mr. Roylston. You will notice under the statement I have said Less: Included Above Under Professional and Rental Expenses Claimed, the item we were just discussing?

Q. Yes, sir.

A. Under the other deduction I have Less: Allowance for Items Taken as Expense. There is a little different phraseology there.

Q. What I am getting at is if this amount of \$783.22 was included in the \$4,683.09 and was also included in the \$19,037.76 it would amount to a double deduction, isn't that correct?

A. No, sir, that is not correct at all. I think I had better explain this thing a little bit further to you.

Q. Yes, sir, I wish you would.

A. At the conference I mentioned yesterday with Mr. [466] Whitsett, Mr. Tucker and Mr. Calkins we listed all of the items which they considered as personal expenses, in other words, all the expenditures by check other than what were legitimate, they considered legitimate deductions. They came up with a certain figure which we reconciled with them

(Testimony of R. Dale Moser.)

and I believe we all came in agreement that was correct. Is that right, Mr. Whitsett?

Q. Just testify, because I can't keep up hardly with you, much less both of you.

A. In those items they asked us to stipulate as expenses were certain items which we would not agree. We did agree that the total amount expended was correct; we would not agree they were all personal expenses. The figure they gave us on that particular date was different than the figure they have now. We reconciled to the figure they have on that date and included a certain amount of items which had been claimed by the doctor. In other words, if we had taken that figure without giving him credit for that he would have been charged twice for that same expense, as far as the net worth theory is concerned. Then when the new figure came up we have taken from the amount of items which were listed which have been claimed, we took the difference between that item as stipulated in your request for stipulation, the difference between that in the amount you alleged in your net worth statement, and subtracted that from the amount we had computed was [467] included in professional expense. I have a breakdown of that if you care to see it.

Q. No matter what figure the Government used you were able to reconcile it, is that what it amounts to?

A. That is correct, yes, sir.

Q. Well, now, you stated that you subtracted

(Testimony of R. Dale Moser.)

this item of \$783.22 because it had been included in some other figure there?

A. Yes, that is correct.

Q. Now, which figure do you state it was included in?

A. It was included in the figure of \$19,037.76.

Q. That is the Professional and Rental Expenses claimed?

A. That is correct.

Q. Now, wasn't it also included in the \$4,683.09 which is listed as Alleged Personal Expenses by Check?

A. That is where it was included in that amount by the Government, yes.

Q. \$783 was included in the \$4,683.09?

A. That is correct.

Q. Was also included in the \$19,037.76?

A. Now, I think you are getting the wrong interpretation.

Q. Didn't you state in answer to my first question that it was included in \$19,037.76?

A. Yes in our computation it is included in this \$19,037.76. [468]

Q. Didn't you then state it was included in the \$4,683.09?

A. It is included in the Government's amount of that, yes. That is why it cannot be charged to the doctor twice. We have to eliminate it from one place or the other.

Q. In other words, this method of your computation is the correct procedure to follow in this particular instance?

(Testimony of R. Dale Moser.)

A. In this instance in order to arrive at the expenditures the doctor made it is the only thing you can do. It has nothing to do with preparation of an income tax report.

Q. Yes.

A. In order to account for all the expenditures the doctor made we have to eliminate a double expenditure where it shows twice. You can't charge the doctor for paying a \$100 bill twice and charge it against his net worth when he only paid it once.

Q. That is what I am getting at. You did it the correct way here?

A. That is the way to eliminate the expenditure of double time. It has nothing to do with the preparation of an income tax return whatsoever.

Q. Let me ask you this next question. On Dr. Lutfy's income tax return didn't he claim this in both of these particular instances and it amounted to a double deduction?

A. Why, no, of course not. He doesn't claim a personal [469] expenditure as a deduction.

Q. Let me rephrase it. Probably my phraseology is wrong. Didn't he claim it under both of these particular items which was an unallowable deduction?

A. Oh, no, they are not an allowable.

Q. It is not allowed to be claimed twice?

A. It was never claimed twice. It never was claimed twice. It is claimed only once.

Q. Let me get to this then. Are personal expenses allowable as a deduction?

(Testimony of R. Dale Moser.)

A. That is correct, they are not.

Q. Did Dr. Lutfy claim these personal expenses as a deduction on his return?

A. There again I will have to state these are alleged to be personal expenses and in many cases they are not personal expenses. I have a list of them if you want me to put them into evidence.

Q. Let me rephrase it. The phrase "double deduction" is wrong. What I am getting at is on the return didn't Dr. Lutfy claim these personal expenditures as a deduction when it is not an allowable deduction?

A. I will have to answer that and say he did not claim these personal deductions because they are not necessarily personal deductions.

Q. But he included them in business [470] deductions?

A. I will make a statement which might satisfy you. I will say he claimed these expenditures as deductions.

Q. He claimed these expenditures as deductions?

A. That is correct.

Q. Turn over to the next page, Mr. Moser, the 1947, the one from December, 1946, to December, 1947.

Now, under Available Funds, the second column, you list a loan made by Mrs. Linsenmeyer, you list it Loan from Wife's Mother, \$3,500?

A. That is correct, sir.

Q. Where did you arrive at that figure?

A. I arrived at that figure from Dr. Lutfy.

(Testimony of R. Dale Moser.)

Q. You were present yesterday and heard Mrs. Lutfy state the loan was \$3,200?

A. I believe she stated she did not know but she thought it was about \$3,200. That was the first time I heard the figure \$3,200.

Q. Did Dr. Lutfy explain to you why he hadn't discussed this loan with the Internal Revenue men, why this loan appears here?

A. I didn't ask him.

Q. Did he have any evidence of the loan?

A. He told me what had happened, in which he had to obtain a certain amount of money in cash, that he could not do it in check, had to get a money order from Western Union in which [471] he received \$1,000 from Eddie Basha and received \$3,500 from his wife's mother and that he had never repaid the loan to his wife's mother but had repaid the loan to Eddie Basha.

Q. What I asked you, did he have any physical evidence of the loan?

A. No, he did not have any physical evidence.

Q. At the time you were discussing this with Dr. Lutfy was sometime after Mrs. Linsenmeyer's death, is that correct? A. That is correct.

Q. Now, also under that same year on down further on that same column of Funds Available as Alleged and Reported, you have the Sale of Piano, \$475? A. That is correct.

Q. Where did you obtain that figure?

A. I obtained that figure from Mrs. Lutfy.

(Testimony of R. Dale Moser.)

Q. Did Mrs. Lutfy tell you on what date she purchased the piano?

A. No, she did not. There were no expenditures in the year showing a purchase of the piano.

Q. You heard her testify yesterday she didn't recall when she purchased it?

A. That is correct.

Q. So to list this in this manner without listing an expenditure in the same year is to the taxpayer's advantage, is that correct? [472]

A. That is correct. I listed all expenditures however.

Q. Now, just for a moment going over to the right hand side of that same page, almost half way down that same page under item number 2 you have Less: Refund from Western Camera Shop, \$360.50. Will you explain what that item is?

A. It is a typographical error in the name. It is Weston's Camera Shop.

Q. Yes, sir.

A. That was the amount of a refund which the check was introduced in evidence here, that was a refund to Dr. Lutfy.

Q. Will you explain under Expenditures as Alleged and Claimed Plus Cash End of Year, if this item shows as an expenditure?

A. That is correct.

Q. Where is that item?

A. It would be—I believe it is in this same item which I have keyed in number 2.

(Testimony of R. Dale Moser.)

Q. You deducted that amount of \$360.50 from the \$19,023.79 right above it?

A. That is correct.

Q. And arrived at this figure over under the expenditure column of \$18,663.29?

A. That is correct.

Q. Will you explain why you deducted that for the purposes of your computation when the doctor claimed it on his tax return? [473]

A. I deducted it from my computation because that additional funds were available to apply against his expenses. It was the return of a purchase. The fact that the doctor claimed it on his tax return has no bearing on the fact he did receive it back and thus reduce expenses.

Q. The point I am trying to get at, the doctor claims it as a business expenditure on his tax return, then that is to the doctor's advantage, isn't that correct?

A. That is correct.

Q. And rather than leave it the way Dr. Lutfy claimed it you deducted it for the purposes of your computations so it would balance out?

A. That is correct.

Q. Then in other words, Dr. Lutfy gets the advantage of the deduction and gets the money back both, is that correct?

A. You are correct in that statement.

Q. Now, I wanted to question you concerning the sale or the purchase by Dr. Lutfy of a Ford automobile during the year 1947 when Dr. Lutfy traded in an automobile and paid a balance of

(Testimony of R. Dale Moser.)

\$760, and ask you if that shows under your expenditure column?

A. No, it does not. I don't recall—I don't know. I know he purchased a Ford automobile and paid 266.02.

Q. That was in 1946. I am talking about the year 1947, a purchase by Dr. Lutfy of an automobile by trading in another [474] automobile and paying a balance of \$760?

A. No, I have no computation of that fact.

Q. You don't show that at all?

A. I don't show that. I do not show he had an automobile he could trade in. It was not included in the alleged net worth statement at any time.

Q. This is an automobile which was purchased and sold in the same year so it would not show on that net worth statement?

A. There is no evidence of any checks being written for that amount that I could determine.

Q. So Dr. Lutfy didn't tell you about this expenditure of \$760?

A. It is not listed on his checks by which I could determine.

Q. Now, under that same expenditure column you have listed the purchase of stock in Arizona Country Club, \$500? A. That is correct.

Q. I will ask you did you include the expenditure of the initiation fee of \$100?

A. There is no initiation fee in the Arizona Country Club stock. I did not include it, no. I took the figure which you use.

(Testimony of R. Dale Moser.)

Q. Do you know why the check was made out for \$600? A. Certainly.

Q. Will you explain? [475]

A. It is the excise tax of twenty per cent on a \$500 purchase which is part of the cost. I used your cost as alleged.

Q. No matter what the item was spent for there was an expenditure of \$600 there, is that correct?

A. That is correct.

Q. And you list that as expenditure 500?

A. I list it as you listed it.

Q. On the net worth statement it is the value of the stock that shows up, isn't that correct?

A. No, on the net worth statement is what you allege the value of the stock to be. I am tying in with your alleged net worth statement.

Q. Didn't you say the value of the stock was \$500?

Mr. Parker: If your Honor please, that was proposed by the Government to which we agreed. Now counsel is attempting to impeach his own proposal and his own stipulation. I object to the procedure.

Mr. Royston: That is incorrect, the statement Mr. Parker made.

Mr. Parker: I challenge anywhere, any day.

Mr. Royston: We are here today, we can do it right now. The stipulated cost of the bond was \$500 and it is included on the net worth statement to show the worth of Dr. Lutfy as \$500. In this computation where it is balancing the [476] ex-

(Testimony of R. Dale Moser.)

penditures against the net income we have to have the total amount of the expenditures and the witness himself stated that the expenditure was \$600 so it should show as that.

The Court: The witness has answered your question, Mr. Royston. He said why he used \$500 because it was in your statement.

Q. (By Mr. Royston): And the check was for \$600, the expenditure? A. That is correct.

Q. So then according to the expenditures this amount here is \$100 off, that would throw the total off \$100?

Mr. Parker: I object to that as argumentative. He has answered that fully.

The Court: No, he may answer.

A. That is correct.

Q. Now, on the item of the purchase of the Lincoln automobile for \$5,420 you listed that as the amount of the expenditure on that item, isn't that correct? A. That is correct.

Q. I want to show you—rather than hunt it out, this letter that was introduced by the defendant yesterday shows there was an additional expenditure of \$1,000 for commissions, is that correct?

A. I don't recall that was correct, no.

Mr. Royston: I will hunt it out. If I might read a [477] part of this defendant's Exhibit F to the Jury.

The Court: Mr. Royston, you are on cross-examination now. Let's proceed on the cross-examination.

(Testimony of R. Dale Moser.)

Q. (By Mr. Royston): All right, sir. I will ask you to read that letter to yourself.

A. All right.

Q. After reading that letter wasn't there an additional expenditure of \$1,000 as a commission in connection with the purchase of this automobile?

A. The letter does not state it was \$1,000 commission, no, it does not.

Q. Well, let me ask you as an accountant what this sentence means, Mr. Moser: "The actual cost for our car, however, in Chicago was \$5,420, which does not include a little over \$1,000 of commissions and extras paid for this car."

A. Commissions and extras, not commissions.

Q. Oh, that is the quibble, on the word "extras."

A. You asked me a direct question and I answered it.

Mr. Parker: I move the statement of counsel be stricken and the Jury instructed to disregard it.

The Court: The Jury will disregard the remarks of counsel.

Mr. Parker: May I interrupt, Mr. Royston. At this point I think a matter should be cleared up which is a matter of record here. This stipulation number 26 contained in the [478] Government's own Exhibit 31 reads as follows: That on or about February 25, 1947, Louis P. Lutfy purchased one share of stock in the Arizona Country Club, Phoenix, Arizona, for the sum of \$500. And that on December 31, 1947, and December 31, 1948, he

(Testimony of R. Dale Moser.)

owned that share of stock. That is the Government's stipulation.

Mr. Royston: Yes, sir, that is right. What I was trying to show is the total expenditures which Mr. Moser has listed on this and if there was an expenditure of an additional \$100 as the check itself showed, which the witness stated, I think I should have a right to bring out that additional expenditure.

The Court: Mr. Royston, aren't you doing this, you agreed with counsel, both of you agreed and told the Jury they may accept it as a fact that he spent the sum of \$500 for this share of stock. Now you propose to go back on the stipulation because you find it advantageous for another purpose to show that isn't the fact.

Mr. Royston: No, sir, I am not disputing the fact the \$500 was the cost of the bond, what was paid for it, but under this statement, this accounting procedure which the witness has drawn up, there purports to list the expenditures of Dr. Lutfy. And if he expended the amount of \$100 in addition to this \$500 share of stock then it should show up under this expenditure. [479]

The Court: No. If you intended to show that you should not have stipulated to the fact it was \$500.

Mr. Royston: Well then, let me put it this way. We stipulated the cost of that particular bond was \$500. Now, here the witness has listed all the expenditures. Now, in connection with the purchase of that \$500 bond there was an additional expendi-

(Testimony of R. Dale Moser.)

ture of \$100 which does not show on this statement which was prepared by the witness.

The Court: No. I will sustain the objection of going beyond the stipulation.

Mr. Royston: For the purposes of showing the expenditures as connected with this statement?

The Court: On that particular item. Counsel stipulated as to the fact and that will be the fact in the trial.

Q. (By Mr. Royston): Now, Mr. Moser, go on down to this item which you subtracted, this \$2,506.27. Now, I will ask you to explain what this item was subtracted from?

A. It was subtracted from the item that was followed by the numeral 2, \$18,663.29.

Q. I will ask you if according to Dr. Lutfy's tax returns this amount as well as being included in the 18,663.29, if it was not also included under the capital assets?

A. That I would say as an item they were not. What doctor used in his computation I have no way of knowing. They were not listed as items, they were listed as expenditures and for [480] the purposes of this statement they must be reduced from that amount which was spent. He cannot be charged with spending the same amount twice.

Q. Well, if you say he can't be charged with expending the same amount twice just where is it in here twice?

A. If I didn't show a credit of 2,506.27 in this

(Testimony of R. Dale Moser.)

computation and showed he had spent the money as alleged by the Government for capital assets I would be charging him twice with an expenditure, is that not right?

Q. That is just the point I am trying to get at. As well as being included in this 18,663 on the return it was also included on the capital assets on the return, is that correct?

A. Again I will state it is not included as these assets on the return, that is correct.

Q. You state it was charged twice?

A. I didn't state it was charged twice, Mr. Roylston.

Q. I believe you said you subtracted it because it shouldn't be charged twice?

A. That is correct. You cannot charge the taxpayer on this statement with expending the same money twice for the same thing.

Q. Where are the two places it is charged?

A. It is charged in this 18,663.29.

Q. Where is the other one?

A. And you have claimed on your Government's alleged net [481] worth that it should be included in these items above. So in order to tie in with your net worth statement I have to show that amount expended to come to the total that you have in your statement at the end of the year. If I used that amount in that portion of the statement I am not going to charge the doctor again with it down here.

(Testimony of R. Dale Moser.)

Q. In other words, you computed it in the manner in which it should have been computed?

A. I computed it in a manner to tie in with your statement.

Q. But you did not compute it in the manner Dr. Lutfy listed it on his return?

A. The way Dr. Lutfy listed it on his return has nothing to do with that computation here, nothing whatsoever.

Q. That is all. Now, move on down. The same thing applies to item \$1,073.73?

A. That is correct.

Q. Now, concerning a payment made to Coles Furniture Store of \$283.05?

A. Yes, sir.

Q. You were here when the witness testified that amount was refunded to Dr. Lutfy?

A. Yes, sir.

Q. You show that as available income, you show the refund as available income for 1948? [482]

A. That is correct.

Q. Where do you show the expenditure of that amount to Coles?

A. In 1947.

Q. Where is it?

A. It is included in the total amount spent. The expenditure was not made in 1947, I mean in 1948, and the refund was. You have to take the amount that came in 1948, but there was no money expended in 1948 for that purchase.

Q. Yes, sir. If the refund is listed as available income in '48 then the expenditure for that amount has to show up somewhere?

(Testimony of R. Dale Moser.)

A. Yes, it was paid in 1947.

Q. Where is it in 1947?

A. It is included, the particular check was included in this figure of 18,663.29. In fact, the 19,023.79 reduced by the \$360.50.

The Court: At this time, Members of the Jury, we will take the regular morning recess.

(Recess.)

Q. (By Mr. Roylston): Now, Mr. Moser, I believe you were testifying concerning an expenditure and refund from Coles Furniture Company in the sum of \$283.05, the expenditure being made in 1947 and refunded in 1948? [483]

A. That is correct.

Q. You stated that that expenditure was listed on the 1947 return in the figure \$18,663.29?

A. Yes, sir.

Q. I believe that item \$18,663.29 is a business deduction, is that correct?

A. That is correct. That was the amount which was spent, which was claimed for business deduction.

Q. Claimed for business deduction?

A. That is correct.

Q. Did you hear the lady from that furniture store testify that item was for a Marietta dining room set? A. I did.

Q. Is that an ordinary business expenditure?

A. May I make a statement?

Q. No, I want to get the question.

A. It is not.

(Testimony of R. Dale Moser.)

Mr. Parker: You may explain your answer if you wish. I believe that will be proper.

The Court: I will let you reach that on redirect examination.

Q. (By Mr. Royston): Now, Mr. Moser, turning the page over to the year December, 1947, and December, 1948. Under Expenditures as Alleged and Claimed Plus Cash End of Year, that item which was subtracted down there, \$2,912.20, the discussion [484] which we have had on the two previous years would apply likewise to this year?

A. That is correct.

Q. And the same thing would apply to the subtracting of the figure of \$855.48?

A. That is correct.

Q. That is the same as the discussion we had concerning the two previous years?

A. That is correct.

Q. Let's leave this thing for a few minutes. I think I have covered everything I wanted to on that.

You stated you have been a Certified Public Accountant for some number of years, Mr. Moser?

A. Yes, sir.

Q. And you received your training at La Salle Institute? A. Partially.

Q. That La Salle Institute, that is a correspondence course? A. That is correct.

Q. And you were certified both in California and now in Arizona? A. That is correct.

Q. I believe you stated you have been working

(Testimony of R. Dale Moser.)

on this particular matter of Dr. Lutfy's returns for the years 1945 up through 1948, you have been working on that for at least, off and on, for some year or so? [485] A. That is correct.

Mr. Royston: Would you mark this, please?

(Government's Exhibit 38 marked for identification.)

Q. (By Mr. Royston): Now, Mr. Moser, I hand you this 38 for identification and ask you if you have ever seen that document before and if so where and when? First, let me ask you, let me divide the question up. Have you ever seen that document before? A. I believe I have.

Q. Did you prepare that document?

A. Yes, sir.

Q. Was it prepared in connection with Dr. Lutfy's income? A. That is correct.

Q. Or in the income tax.

Mr. Royston: I will offer Government's Exhibit 38 into evidence.

Mr. Parker: May I ask a question or two on voir dire?

Q. (By Mr. Parker): Mr. Moser, when was this Exhibit 38 prepared?

A. That was prepared in the early part of January, I believe, in 1952.

Q. And for what purposes?

A. It was a computation which was prepared after a conference with Mr. Cass in Los Angeles either the first part of January or last part of

(Testimony of R. Dale Moser.)

December, in which certain information [486] which became available to us for the first time was given to me by Mr. Cass; and using that information without verification I attempted to show that Dr. Lutfy could have, from the income he reported, could have accumulated what the Government at that time were claiming he had.

Q. Did you at that time have the figures which have been made available here in this trial through the Government's Exhibit 33? A. I did not.

Q. And the stipulations? A. I did not.

Q. Were there any stipulations in existence at that time? A. No, there was not.

Q. You say these were unverified figures?

A. Unverified figures, mostly furnished in this conference I had with Mr. Cass.

Mr. Parker: If your Honor please, in view of the stipulations the Government has entered into in this trial I don't believe the Government should be permitted at this time to submit anything or to go into evidence which is contrary to those stipulations.

Mr. Royston: Let me ask just a couple more questions then reoffer the Exhibit.

The Court: Very well.

Q. (By Mr. Royston): Mr. Moser, before you prepared [487] this which you carried over to Mr. Cass I believe you examined all of the deposit slips for the years 1945 through 1947, isn't that correct?

A. No, just a portion of 1947. All of 1945.

(Testimony of R. Dale Moser.)

Q. Well now, just to refresh your recollection on that matter, without having it marked, I will show you that and ask you if that refreshes your recollection, that first paragraph?

(Document handed to the witness.)

Q. Did you read it? A. Yes.

Q. Does that refresh your recollection as to whether you examined——

A. I examined the records, yes.

Q. And all of the deposit slips for the years 1945 through 1947?

A. Through October, 1947, I believe.

Q. And you identified the source of substantially all the funds deposited according to those deposit receipts? A. That is correct.

Mr. Royston: I will reoffer this.

The Court: May I see it. I will reserve ruling on that until I have had a chance to study it.

Mr. Parker: May I state an objection, that it is immaterial, irrelevant and the further objection the Government [488] is now attempting to impeach its own stipulations.

Mr. Royston: It might save the Court some time if I made the representation there is only one figure on that which I want to refer to.

The Court: You go ahead. I will give you an opportunity to do that before I rule on it.

Mr. Royston: All right, sir.

Q. (By Mr. Royston): Now, to discuss just

(Testimony of R. Dale Moser.)

a few minutes these log books which were kept by Dr. Lutfy? A. Yes, sir.

Q. Which you testified yesterday concerning the log books and methods of entry? A. Yes, sir.

Q. You mentioned there were certain imperfections in this so-called physicians' log book as far as bookkeeping procedure?

A. That is correct.

Q. Isn't it true such a record as this log book or any similar record will correctly reflect the income only to the extent the correct information is recorded in that record?

A. That is true of any set of books.

Q. It reflects it only to the extent it is correctly recorded? A. That is true.

Q. That is a true statement of any record applying to receipts as well as expenses, isn't that true? [489] A. That is correct.

Q. You mentioned the so-called regular books. Will you explain what you mean by "regular books"?

A. By that I meant a double entry set of books where an error could be detected because your subsidiary ledger and other substantiating books would not be in balance with the amounts you showed on your control accounts.

Q. Isn't it true this method of bookkeeping you refer to as regular books they will fail to reflect true income if income is not recorded in the books?

A. Yes. If the information is recorded only in part—for instances, in reconciling your bank ac-

(Testimony of R. Dale Moser.)

count and that amount of money went into the bank and wasn't reflected in the income in that book that would be detected.

Q. Isn't it true regardless of the type of records kept by any business or professional man that the correct information must be entered in those books in order to reflect the correct income, isn't that true?

A. I believe that is self-evident, yes.

Q. As to any books? A. Any.

Q. Whether this log book or regular books, anything else? A. That is right.

Q. Well now, you heard Mrs. Way testify?

A. Yes. [490]

Q. And you heard her state that each night before she and the doctor left the office that these books were checked and rechecked to make sure there were no errors in the books?

A. That is correct.

Q. Now, you examined these duplicate bank deposit tickets? A. I did.

Q. All bank deposit tickets of Dr. Lutfy?

A. All available to me, yes.

Q. You stated from your examination you eliminated from these deposits any items which did not relate to the defendant's medical practice and that you discovered that the receipts as reflected by the log book exceeded those deposited in the bank account, wasn't that your testimony?

A. That is correct.

Q. Now, are you attempting to say Dr. Lutfy

(Testimony of R. Dale Moser.)

reported more income than what he actually earned?

A. No. My only purpose in making that statement was to show that our examination of the duplicate deposit slips did not reveal he had received money from that source which was not reported.

Q. Did you ever check the bank deposits to see if there were any receipts or if any receipts were deposited through these bank deposits that were not reflected in this log book? A. Yes, I did.

Q. Did you find any receipts on the deposit slips, any [491] money that had been received and listed on the deposit slips that did not reflect in the log book? A. Yes, I did.

Q. Now, on finding that then would you state the books were kept completely or incompletely or how?

A. I would say that there were errors in the bookkeeping.

Q. Would you state the books reflected the true income of Dr. Lutfy?

A. No, they did not reflect the true income.

Q. Were the figures in the log book used in determining—— A. They were

Q. What other check of Dr. Lutfy's records did you do, briefly?

A. Examining cancelled checks. I examined the patients' cards, log books and deposit slips.

Q. Did you find——

A. And supporting evidence of various kinds, letters and so forth of correspondence.

Q. You examined his returns, too?

(Testimony of R. Dale Moser.)

A. I examined the returns.

Q. Did you find where Dr. Lutfy had changed any personal expenses to business?

A. I found items which were debatable, which in my opinion possibly without investigation as to what an item might be, might be assumed to be personal, but that in the net worth [492] case again it is immaterial what the deductions are as long as we account for the expenditures. That is what this statement I just had brings forth.

Q. Did you find this Marietta dining room table? A. I found an expenditure there.

Q. Did you find it listed under business expenditures?

A. I did. Could I elaborate on that a little bit?

Q. I am sure you will be given an opportunity, you might as well do it now. Go ahead.

A. I found there were several checks as stipulated introduced into evidence by the Government which was agreed upon as to amounts spent as to this particular place. I found that was the only check during the three years which was changed to personal expenditures.

Q. You mean which was changed to business?

A. To business instead of personal, on that particular concern.

Q. You heard the testimony concerning this other purchase of a French Provincial table; you heard Mr. Whitsett's testimony it was changed to drugs and supplies? A. Yes.

Q. Did you find that in the records?

(Testimony of R. Dale Moser.)

A. I found that in the records, yes.

Q. That was another item in addition to this Marietta dining room set? [493]

A. It did not come from the same place.

Q. No, but I understood you to say the only check you found so changed——

A. I made the statement, I believe, Mr. Royston, that I examined other checks made to the same concern to which this check was and none of these other checks other than this one check was changed to business expenses.

Q. You mean as far as any expenditures to Coles Furniture that was the only one there is to business expenditure?

A. That is correct, that is the only one I found changed to——

Q. To this Dorris Heyman Company you found this French Provincial table changed to drugs and supplies?

A. That is correct. I found a check changed to supplies. I didn't find it was a Provincial table at that time.

Q. At that time? A. That is correct.

Q. Did Dr. Lufly tell you what that was?

A. What the purpose was. I discussed the matter with Dr. Lufly and he told me that to the best of his knowledge that at that time he took the date into consideration and all; to the best of his knowledge it was for a diathermy couch.

Q. Diathermy couch?

(Testimony of R. Dale Moser.)

A. He said he believed that was what it was, he believed [494] it was for a diathermy couch.

Q. You found these two poker losses of approximately \$700? A. I did.

Q. And you found those were changed to——

A. I did.

Q. Now, did you find these compotes which Mrs. Lutfy purchased?

A. I found a check for \$36 and some cents, I believe.

Q. Were you told those were for compotes?

A. No, I wasn't.

Q. You heard Mrs. Lutfy testify concerning the purchase of the compotes? A. I did.

Q. You found those were changed to drugs and supplies?

A. I found they were changed to expense. I could go to my record and see what account they were changed to.

Q. Anyhow, it was changed?

A. Yes, I believe it was changed.

Q. If it wouldn't take too long see if it was changed to drugs and supplies?

A. That was in what year, Mr. Royston?

Q. I believe it was 1946. It is a purchase from Rosenzweig Jewelers.

A. Do you have the date of the check? [495]

Q. Well, not close here. I have got it but I don't know where to look for it.

A. December 31, 1946. Yes, it was changed to drugs and supplies, \$36.72.

(Testimony of R. Dale Moser.)

Q. That was the purchase Mrs. Lutfy testified was made for Christmas gifts?

A. That is correct.

Q. It was on December 31, 1946?

A. That is correct.

Q. And changed to drugs and supplies?

A. That is correct.

Q. In checking through Dr. Lutfy's records did you find any items which were capitalized and also changed to expense?

A. The doctor's records do not capitalize items.

Q. Did you make an examination of the records to tell just what had been going on?

A. I examined his checks as I explained and his log books, but his records don't show what have been capitalized.

Q. Well now, referring to Government's Exhibit 27 and referring to the part of the Exhibit which Mrs. Lutfy stated is in the doctor's handwriting from depreciation down to this word "improvement and addition," did you ever see that particular record?

A. Yes, I saw that record.

Q. And what is that? [496]

A. That is a list of equipment—not a list of equipment but a classification of equipment by total amounts.

Q. Well, is that a capitalization schedule?

A. No, it isn't a capitalization schedule, it is a depreciation schedule, you might call it. It is a list. Actually it isn't a schedule. Actually what it is it is a list of, in round figures, of medical

(Testimony of R. Dale Moser.)

equipment, X-ray equipment, clinical, and so forth, with no depreciation figured on it. It isn't an itemized list of what makes up the capital assets at all.

Q. The what?

A. It isn't an itemized list of what makes up the capital assets.

Q. What I am trying to get at—I don't know the exact phraseology for the account but isn't that a depreciation schedule of capital assets?

A. No, it isn't a depreciation schedule. There is no depreciation on it at all.

Q. Does that schedule refer to capital assets?

A. That refers to assets subject to depreciation.

Q. Are assets subject to depreciation, capital assets?

A. By definition they are not, by income tax law.

Q. What is a capital asset, Mr. Moser? I think we are haggling over details.

A. I am trying to answer the question as you ask it. [497]

Q. Let me ask you this. Would medical equipment, X-ray equipment, laboratory equipment, office building, an addition to office, stucco house—I can't read the next one—and a triplex, are those classified as capital assets?

A. No, sir, they are not.

Q. What are they?

A. They are other assets which under Section 117-J under the Internal Revenue Code may be treated as capital assets.

Q. These are items which can be treated as

(Testimony of R. Dale Moser.)

capital asets? A. Yes, sir.

Q. In your expert opinion if I was asking you about the capital assets would I ask you further if you found any items which were capitalized and credited as business deductions both?

A. Again I must say there is no way of determining what is in the doctor's list of other assets. There is no itemized list at all available. I do not know what he included.

Q. Didn't you make an audit of the doctor's books?

A. Yes, sir. There was nothing to audit on this particular question.

Q. From the returns did you find that items were both listed for depreciation and listed for business expenses? A. I did not.

Q. Did you find that in the doctor's [498] records? A. I did not.

Q. Did all those figures in the doctor's records mean anything to you?

A. They could have been built up but there were no figures there, there was nothing to indicate what items were changed into this amount here, nothing at all.

Q. Let me ask it this way. From your examination of Dr. Lutfy's records could you tell that there were no items which were capitalized and also claimed as business deductions?

A. I could not tell they were not; I could not tell they were.

(Testimony of R. Dale Moser.)

Q. You couldn't tell much of anything from the doctor's books, is that what it amounts to?

A. On this particular question, that is correct.

Q. Let me ask you this. As an accountant, if a taxpayer capitalizes assets and claims then the same assets under business expenditures and if the taxpayer lists personal expenditures as business expenditures what effect does that have on the ultimate tax which the taxpayer has to pay on the income?

A. In those cases where if he had capitalized items and claimed it as depreciation and also claimed it as expense it would result in a double deduction.

Q. And would result in a smaller tax?

A. In a smaller tax.

Q. And would the same thing apply as far as expenditure [499] for personal items which are listed as business expenditures?

A. If they were non-allowable items it would be a deduction in a tax. It would not effect a net worth in any way or effect expenditures for the period.

Q. Let me ask you this. Personal expenditures are not deductible, is that correct?

A. That is correct, purely personal items. Certain personal items are not deductible.

Q. Well, would a Marietta dining room set be deductible? A. No, it would not be.

Q. Would a French Provincial table be deductible? A. No, it would not.

(Testimony of R. Dale Moser.)

Q. Now, referring to items such as that, if the taxpayer claims those expenditures as business expenditures what would the result be in the final tax which the taxpayer pays?

A. It would be less.

Q. Now, in examining Dr. Lutfy's records did you find any utility bills with relation to this Granada Street property, the residence of Dr. Lutfy, which were listed as business expenditures?

A. I found a very, very few.

Q. But there were expenditures there?

A. Very few, yes. Very few.

Q. Now, referring to this 1948 return, the items which are listed for depreciation purposes on that 1948 return, did [500] you attempt to determine from Dr. Lutfy's records what the actual cost of each of those assets was? A. I did not.

Q. You didn't go into that? A. I did not.

Q. Did you not need that figure for a full audit of Dr. Lutfy's records?

A. If I was going to make a certified audit as a doctor I would need it, but for income tax purposes I did not think it necessary because I started from another basis.

Q. This audit you made is not a certified audit?

A. I have expressed no opinion. This is not a certified audit, this is a tax audit pertaining to this case only. This is not a certified audit at all. A certified audit is entirely a different thing. A certified audit is an audit in which you state that without any qualified opinion or qualified opinion, as

(Testimony of R. Dale Moser.)

the case might be, that a certain business has a certain amount of assets and liabilities as of a given date, which are confirmed with outside creditors and so forth and so on. It is entirely a different proposition than obtaining information in regard to taxes.

Q. A certified audit of necessity has to be a much more thorough audit than the one you conducted on Dr. Lutfy's records?

A. I would not say it is necessarily much more thorough, [501] it is different.

Q. In order to certify this particular audit it would require much additional work?

A. It would require additional work; it would not require some of the work which I did, which would not have been required. In other words, to clarify that a little bit for you, possibly, take as a given date we will take the bank account; it would be sufficient to verify there was a certain amount of money in the bank as of a certain date but would not be necessary to verify where that money came from over a period of time. There is no comparison.

Q. Is this statement correct that your information would have to be more accurate to certify an audit than if it wasn't certified, the information on which you based the audit must be more accurate than a certified audit?

A. No, I think that is not a correct statement, Mr. Royston. I think the statement would be that it would require outside confirmation other than

(Testimony of R. Dale Moser.)

the records of the person which we are auditing more than the fact it would not necessarily be accurate.

Q. Just in general, if a businessman walks into your office and says, "I want your audit on this and I want to make sure that all these things are accurate in my books," would you advise the client to have a certified audit?

A. It depends on what purpose he wanted the statement for. [502]

Q. If he wanted a real good audit, just a perfectly good audit, would you advise it to be certified?

A. No, not necessarily. I will state it this way. If a man came in and he wants to know that every transaction in his business had been properly recorded, there was no chance of any error in any single item of one cent to one thousand dollars in any amount, I would make a detailed audit of that man's records of every transaction that had taken place entering into his books and I would still not be able to certify that statement.

Q. Let me ask you this question. I don't mean to be dwelling too long on this, but is a certified audit of necessity more accurate than a general audit?

A. Not more accurate, I wouldn't necessarily say.

Q. Let me ask you this. What is the purpose of a certified audit?

A. The purpose of a certified audit, the principal purpose is to have an independent opinion given by personnel who are trained to present the facts stat-

(Testimony of R. Dale Moser.)

ing the net worth of a particular business, results of its operations for a certain period of time. And in order to acquire that statement you have to send out notifications to every account receivable; you have to confirm directly with the banks as to the amount on hand on that particular date. You don't have to go back and find out how that money got there; you have to [503] send notifications to every person who that client has purchased anything from for the entire period to find if they owed them anything in that time which was not on the records, you have to investigate any contingent liabilities the client might be trying to secure or a note at the bank, commitments he might have as far as purchasing material.

Q. So we won't go on all morning, let me ask you one further question, maybe we will get it cleared up. When you certify an audit, that means the same as if you are insuring the correctness of that audit, isn't that correct? A. No, it does not, sir.

Q. What does it mean?

A. In means, in my opinion——

The Court: Mr. Roylston, the certificate would determine what it meant. You can't talk about the certificate without knowing what the certificate is.

The Witness: We don't even state——

The Court: Just a moment. I am trying to save a little time here.

Q. (By Mr. Roylston): This wasn't a certified audit here? A. This was not a certified audit.

Q. I will leave that point. This audit you made

(Testimony of R. Dale Moser.)

you state was in connection with only income tax purposes? A. That is correct.

Q. In connection with the income tax purposes, did you make [504] any attempt to determine if Dr. Lutfy depreciated the furnishings in his personal residence? A. I did not know.

Q. Well, if a taxpayer depreciates furnishings in his personal records would that affect the final tax which is to be paid? A. That is correct.

Q. Is a taxpayer allowed to depreciate furnishings of his personal residence? A. He is not.

Q. Did you attempt to determine if Dr. Lutfy depreciated the building of his personal residence, the place where he lived?

A. No, I did not. As I stated, Mr. Royston, I attacked the depreciation problem from an entirely different angle. In fact, we put in evidence yesterday.

Q. Just from a general principal a taxpayer is not allowed depreciation on his personal residence, building or the furnishings, is that correct?

A. That is correct. [505]

* * *

Cross-Examination

(Continued)

By Mr. Royston:

Mr. Royston: If it please the Court, at this time we offer Government's Exhibit 38 for identification. I will show it to Mr. Parker.

Mr. Parker: If your Honor please, I see nothing

(Testimony of R. Dale Moser.)

to [507] change the situation with respect to this Exhibit, therefore I make the same objections heretofore made and the further objection as appears here, the Exhibit in the course of negotiations looking toward compromise and so forth——

The Court: The objection will be sustained.

Q. (By Mr. Royston): Mr. Moser, in connection with your testimony yesterday afternoon concerning that statement which was made out by Dr. Lutfy, to, I think the Northwestern Mutual was the name of it? A. Yes, sir.

Q. Do you have your figures on that with you?

A. I believe I do have, sir.

Q. Can you tell me, please, sir, what those figures are and let me set them down here so we can get them big and look at them; tell me what you did in computing that figure which you stated to Mr. Parker showed Dr. Lutfy, during that period, had more income than what the statement showed?

A. The business income per month, \$1,665.

Q. That's what the statement showed which was made by Dr. Lutfy to Northwest Mutual?

A. That is correct.

Q. Show me the next, what you did?

A. Took per year which would be twelve times that amount, I believe would be \$19,980.

Q. \$19,980? [508]

A. I believe that is correct.

Q. All right, sir. What did you do next?

A. Then I took the amount of reported gross income for information only for professional services.

(Testimony of R. Dale Moser.)

Q. What figure was that?

A. \$37,105.29. Then I took the net income reported from his return.

Q. Yes, sir. A. I believe \$16,927.37.

Q. Yes, sir.

A. To that figure is net, I added back the non-cash deduction, \$3,600.

Q. You added that to the \$16,000?

A. That is right.

Q. Is that the figure you got?

A. I believe so.

Q. Then what did you do next?

A. That is it.

Q. Actually, this figure, here, doesn't have anything to do with it? A. Nothing at all.

Q. I will rub this one off. You state, according to the statement which was made to the insurance company, this was the amount of net through annual income?

A. That is the way I computed it, yes, sir. [509]

Q. And, according to your computation and the returns, you added back the \$3,600 which was an expenditure? A. Which was not an expenditure.

Q. Which was not an expenditure?

A. That is correct.

Q. That leaves this amount here (indicating).

A. That is correct.

Q. Which, according to the doctor's income tax statement, he actually had as net income during that year? A. From the professional income, yes.

Q. Now, I am going to set that off, Mr. Moser,

(Testimony of R. Dale Moser.)

and I am going to ask you now, to give me the figure—this is the figure that was reported on the line as net income from professional?

A. That is correct.

Q. What is the amount shown on the statement which was signed by Dr. Lutfy to the insurance company as a monthly income from rentals or whatever that next figure stated there?

A. I don't have the Exhibit, but I believe from my working papers here, it was \$660 per month.

Q. \$660. Now, if these two figures which the Doctor stated on that statement to the insurance company are added will give \$2,325 per month, is that correct?

A. That is correct.

Q. Now, we take that for a year which is the same as you [510] did over here (indicating), does that look like it would be correct?

A. Looks like it would be approximately so.

Q. Now, then, I am getting up to a question, now. All this is leading up to what I want to ask you. Now, I want you to watch this next computation and tell me what is wrong with this computation which I am setting here on the board. I am going to take this amount of net reported income off the Doctor's return—do you have a return for that year there?

A. I have a copy of it.

Q. I am going to set that down, \$19,453.62. Is that what your copy shows?

A. That is correct.

Q. What was the amount it shows on yours as the total amount of expenditures on that '48 return?

(Testimony of R. Dale Moser.)

A. Total amount of expenditures?

Q. Yes, sir. Is it \$4,442.88, is that what your return shows? A. No, nothing like that.

Q. Maybe I am asking about the wrong figure. Now, this figure of \$3,600, that was the amount claimed as depreciation on the medical practice?

A. That is correct.

Q. All right, sir. Look at the '48 return, and tell me what the amount is claimed from both the medical profession and [511] the rentals, the amount of depreciation there?

A. I believe the figure for depreciation on the rental was claimed at \$842.88.

Q. Adding that to this \$3,600, this is the amount claimed on the business? A. That is correct.

Q. The profession? A. That is correct.

Q. And the other amount on the rental, that adds to a total of \$4,442.88, is that correct?

A. That is correct.

Q. Now, then, adding that together, the total amount which is the same as you did here on the medical part, this was on the medical profession alone? A. That is right.

Q. On the entire amount, adding that together, I got \$23,896.50, is that correct?

A. That is correct.

Q. Now, explain to me then, according to the statements which Dr. Lutfy made on that insurance statement, why wouldn't that statement made on the insurance statement show that Dr. Lutfy's stated net

(Testimony of R. Dale Moser.)

income was approximately \$4,000 more than the reported income?

A. I can explain that if you will let me.

Q. That is what I am getting up to. [512]

A. I asked that question of Dr. Lutfy; he told me that he gave this information to the insurance agent in his office. He asked him what he thought he made from his professional income and he said an annual figure which is approximately sixteen thousand—sixteen hundred, sixty-five dollars. He asked him what his figure was for rent; Dr. Lutfy figured up rapidly in his head the amount he got each month from his rental income and he said approximately \$660.

Q. Now, Mr. Moser, what I am trying to get at, this computation you did yesterday tended to show, at least it seemed to me like it showed that the Doctor actually had this amount of income and that, according to that statement to Northwest Mutual, he stated he only had this amount (indicating)?

A. That is correct.

Q. Which would show a surplus of five or six hundred dollars?

A. That is correct.

Q. Now, why would you use this computation yesterday and show that Dr. Lutfy actually had more income than he stated on there if this is correct and this one shows he exceeded the reported income by approximately \$4,000?

A. If you would have let me continue I think I would have brought that point out.

(Testimony of R. Dale Moser.)

Q. Excuse me. I thought you were talking about some conversation. [513]

A. That is right. That is what I asked the doctor.

Q. Go ahead.

A. He said \$660 per month was computed in his head as the amount of rental income he received, and is actually reported on the return which would be the total, incidentally, for the twelve months, \$7,980. He reported his actual receipts from rent as \$7,735, the difference between the figure you have computed there, and the \$27,900 which you have above, is the expenses of his rental property. And when he gave the figure to the Northwestern Mutual, he figured the amount of income he had by months from these individual properties.

Q. Just a couple more question, Mr. Moser. What I am trying to get at is that according to that statement which Dr. Lutfy signed and turned over to Northwest Mutual, isn't it true that, according to that statement Dr. Lutfy stated, he had this amount of net income, \$27,900? A. That is true.

Q. And when you take Dr. Lutfy's return and show the reported income isn't this amount of the reported income which Dr. Lutfy showed on his return, \$23,896.50? A. That is correct.

Q. So actually, yesterday, when you stated that the doctor's monthly income exceeded that which was made on the statement, you didn't include all of Dr. Lutfy's income?

A. I didn't make the statement the doctor's in-

(Testimony of R. Dale Moser.)

come—I [514] made the statement his professional income exceeded that. That is the only statement I made, I believe.

Q. You stated his professional income as reflected by that statement filed with the insurance company, that his reported income was greater than his actual income? A. That is correct.

Q. But now, in order to get the full benefit of that statement and these computations here, it shows actually the statement which Dr. Lutfy made about his income at that time was approximately \$4,000 more than what Dr. Lutfy showed on his return?

A. That is correct.

Mr. Royston: That is all.

Redirect Examination

By Mr. Parker:

Q. As I understand you, Mr. Moser, the figure of \$660 of the rental income is a gross figure and not a net figure as indicated on the insurance company Exhibit? A. That is correct.

Q. And the difference that Mr. Royston is making so much of here is the difference that would be accounted for by the expense of the rental properties, maintenance, repairs, taxes, and so forth?

A. That is correct.

Q. And the net result of that is, there is no substantial discrepancy at all? [515]

Miss Reimann: I object to the leading questions, your Honor.

(Testimony of R. Dale Moser.)

Mr. Parker: It is leading.

Q. (By Mr. Parker): Is there any substantial discrepancy taking into consideration the expenses of the rental property?

A. The statement, Mr. Parker, has inserted as I recall from reading the Exhibit—I don't have it before me—it has in parentheses after the figure, it has "net," which would indicate, of course, net; as the doctor told me he gave them the amount of monthly income he had.

Q. Then the figure of \$660 per month rental income is the approximate gross, not the net?

A. That is correct.

Q. And as you say, computing the rental at \$660 per month gross would give you \$7,900 and some-odd dollars?

A. That is correct.

Q. Whereas, in fact, after the close of the year he reported \$7,700 and some-odd dollars?

A. Yes.

Q. If you recall or refer to the Exhibit, the Exhibit to the insurance company was signed, I believe, in May, before—well, with only four and a fraction months of that year gone by at the time he signed that particular Exhibit?

A. That is correct.

Q. Now, Mr. Moser, Mr. Royston asked you about [516] imperfections in the log book and so forth. I will ask you, Mr. Moser, if your work as an auditor and accountant you commonly or often find anybody's set of books which are entirely perfect and without error or mistake or irregularity of any sort?

(Testimony of R. Dale Moser.)

A. I think I have my first one to find.

Q. And would it be a true statement to say that in the most carefully kept set of books that might be found in any business or profession it would be expected that some errors would be found?

A. I believe that would be true.

Q. Now, directing your attention, say, for illustrative purposes to the year 1948, I believe you have heretofore testified that you had enumerated the cash transactions during that year as recorded in the log book and found there were 3,891 such transactions. Will you tell me how many errors or omissions or mistakes you found for that year?

A. For that year on the information recorded on the patients' cards as being credited to the doctor and were not recorded in the log book, I found that there were fourteen instances.

Q. Fourteen instances out of that number of transactions. Now, if I may see Exhibit 36, please.

With respect to this Exhibit 36 which has received so much attention in which some losses of cards were charged to [517] entertainment, do you observe on the second sheet thereof the letters "O.K."?

A. Yes, I do.

Q. Are those in Dr. Lutfy's handwriting in your opinion? A. I would say not.

Q. In the course of your investigation of this matter, in your audit, did you discover whether or not the accountant who was then employed by him okayed that as a proper charge to entertainment?

Mr. Royston: I object to that as hearsay, if

(Testimony of R. Dale Moser.)

some other accountant is supposed to have written that.

The Court: The objection will be sustained.

Q. (By Mr. Parker): Now, Mr. Moser, I am a little bit confused, to put it mildly, in one respect. Am I correct in my recollection that you testified that the total income reported by Dr. Lutfy for each of these years was more than the total of the bank deposits for each of these years?

A. No, I don't believe that was exactly correct, Mr. Parker.

Q. Will you straighten me out. Maybe somebody else labors from the same brand of confusion.

A. I stated the starting point to try and determine whether all of his professional income had been reported through the tracing of receipts in which we identified all of the sources of income which we could, which went into his bank [518] deposits, coming from sources other than income from professional business, then the amounts which we could identify by the log book from the deposit slips by name, we identified those as coming from professional business. There was certain amounts of cash deposited and there was certain amounts which we were unable to identify as coming from any source. My statement was the amount of gross income that he reported from his professional fees exceeded the amount which we were able to determine from his professional income, plus the cash which was deposited——

(Testimony of R. Dale Moser.)

Q. Now, are you referring to cash that could be identified as well as unidentified?

A. You could never identify the cash. It would all be unidentified cash. Plus the sum of all the unidentified items we were not able to identify, coming from some place else. All of those together were less than the amount which he reported as being from professional income.

Q. Now, with respect to the category of drugs and supplies, will you state to the Jury the general nature of matters charged to that particular category?

A. The drugs and supplies, practically all purchases were charged. There were some segregation. There was an item of stationery, definitely stationery, was charged to stationery. But practically all purchases were charged to the designation "drugs and supplies." [519]

Q. Whether they were in the nature of drugs or not——

A. Supplies of any kind, whether they went to janitor supplies, they were charged in that one category.

Q. Mr. Moser, I think by way of concluding this examination I don't believe it would be too repetitious to ask you once again, if I have not made it clear, to state the purpose of the net worth approach to this type of problem.

A. Well, the net worth approach would be to take as a starting point a given established, claimed, alleged or whatever point you arrive at, a given

(Testimony of R. Dale Moser.)

figure to start a period. That is a net worth figure, worth of the client at the time, or taxpayer. Then you add to that all of the income which he had, whether it is taxable or non-taxable, and apply that to the purchase of assets which would be included in the net worth statement at the end of the year; and you also include all of the expenditures which he has for professional business expense, personal expense and everything else, all the expenditures which he made. If it is shown from the funds which were available that he could have made all the expenditures and have all he was supposed to have at the end of the year, then you have proven that his net worth is possible to be obtained from the income as reported on his return.

Q. Then the objective of the procedure is to discover unreported income if there is any?

A. That is correct. [520]

Q. If I understand your conclusions, the net worth approach here does not disclose any unreported income?

A. That is correct.

Q. As I understand it, for the purpose of this net worth method, you take, you lump all expenditures of personal, business or whatever nature?

A. That is correct.

Q. And you are not concerned in the application of the net worth method with whether such expenditures be deductible or non-deductible for tax purposes?

A. That is in proving the net worth, yes, that is correct.

(Testimony of R. Dale Moser.)

Q. This additional funds available carry-over that is on your Exhibit G for each of these years represents the margin of leeway which the defendant had on a net worth basis, reporting the amount of income he did report? A. That is correct.

Mr. Parker: That is all.

Recross-Examination

By Mr. Royston:

Q. Mr. Moser, I want to ask you one more question. The way you are explaining this now you stated when the doctor looks at this item 660, he listed it as net and he meant gross?

A. That is correct.

Q. When he listed this item he listed it as net and meant net? [521] A. That is Correct.

Q. That is the explanation now?

A. That is what the doctor told me, yes.

Q. He told you that within the past year or so?

A. He told me since this was presented in Court was the first time we knew about this appraisal.

Q. He told you within the last day or so?

A. That is correct.

Q. You stated when you checked these patients' cards against the log book you found only fourteen errors or contradictions?

A. Fourteen credits to the patients' cards which were not reported in the log book.

Q. Isn't it true the patients' cards carried only charge items and no cash items?

(Testimony of R. Dale Moser.)

A. Oh, yes, that is correct.

Q. Did you check the deposit slips to find out how many entries were made on the deposit slips which did not show on the log book?

A. There were many entries on deposit slips which could not be identified as coming from patients. It was an almost impossible task—I think your witness testified to the same.

Q. Did Dr. Lutfy indicate other than patients and tenants that he would have been receiving money from any persons other than you have testified here concerning these one or two loans? [522]

A. Yes, he did indicate that.

Q. Did he do a great amount of business with other than his own medical patients and the tenants?

A. No, he did not.

Q. Did you ask him about these items which were listed on the deposit slips, did you ask him if they were patients when you could find no corresponding entry in the log book?

A. That is correct. I asked him; sometimes he could not identify what they were, did not remember the transaction; sometimes he could identify the fact it was a certain company, we will say, in which it was an odd amount check, say, \$42.58 or some such figure and which he knew one of his patients had worked for that man and he assumed that would be a pay check.

Q. He had money coming from so many different places he couldn't begin to keep up with it, is that right?

A. No, I wouldn't say that, sir.

(Testimony of R. Dale Moser.)

Q. While you were checking through these records, did you find any evidences of any items purchased by Dr. Lutfy's family for their own use, such as drugs, supplies, items from the drug store?

A. I did not find anything of that kind.

Q. Were you able to determine whether Dr. Lutfy and his family had charge accounts at any of the drug stores?

A. No, I didn't ascertain that.

Q. Did you find whether or not the family had any [523] expenditures such as magazine subscriptions, anything like that?

A. I did not.

Q. Did you find any evidence of payments of dry cleaning or laundry for the family, anything like that?

A. I found evidence of that, yes.

Q. Of dry cleaning?

A. Yes, to the Phoenix Laundry, we will say laundry and dry cleaning.

Q. How was it charged on the doctor's records, was it charged to his personal expenditures?

A. There is no charge on the doctor's records to a personal—I don't think you will find those listed in many cases, if any, as a charge to any deduction whatsoever.

Q. Well, these items which you did find, such as dry cleaning?

A. Dry cleaning.

Q. Did you say you couldn't find them anywhere in Dr. Lutfy's records, all you found was a check?

A. Yes, a check. They were not charged to—I think I can show you that they were not charged.

Mr. Parker: What do you mean, "not charged"?

(Testimony of R. Dale Moser.)

The Witness: They were not claimed as a deduction on his professional expense.

Mr. Royston: I object to both of them testifying.

The Court: Mr. Royston, I think you are beyond the [524] scope of the redirect examination at any rate.

Mr. Royston: All right, sir. I will stop that line of questioning. That is all. [525]

* * *

Mr. Parker: Your Honor, I do not wish to consume time of the Court by any repetition of matters heretofore stated to the Court; however, at this time the defendant does move for judgment of acquittal by direction of the Court without submitting this matter to the Jury upon the state of the record which now exists. I might say this, that I had previously contended that this did not appear to us to be a proper net worth case. While it has been tried on a net worth theory and only because the Government saw fit to so try it, and our preparation has been made largely on a net worth basis, we feel that if the Court should agree with us that it is not a net worth case that the entire case would have to go.

The defendant has shown here beyond dispute to have kept a regular set of books. The Internal Revenue laws do not require a taxpayer keep any particular type of bookkeeping [535] system. That is up to him. It has been shown the type of books and rec-

ords he kept are commonly kept by persons of his calling and profession, and therefore there appears to be a very serious question about the employment of the net worth approach to the case.

We further move and again reiterate that the case is now stronger for dismissal or direction of acquittal than it was at the end of the Government's case, because we have shown that even on a net worth basis there is no undisclosed income or unreported income. And the gravamen of the indictment here, it seems to me, and especially when read in the light of the bill of particulars, is an allegation of unreported income. We have shown by proof which I consider to be altogether competent and persuasive and by computations which have, for the purpose of the computations, accepted and swallowed whole the Government's figures; we have shown that Dr. Lutfy's reported income is reconcilable with his expenditures and with the increase in his net worth for each of the three years involved.

Furthermore, we feel that this case is at this stage a stronger case for a direction of acquittal than it was at the end of the Government's case, for the reason that it now appears beyond peradventure that the Government has not marshalled all of the doctor's assets as of the starting date of the period here involved. It is entirely clear now that [536] the doctor had a substantial amount of life insurance. The proof shows the approximate sum of forty-five thousand in face value of such policies; that the policies or some of them have been in effect for quite a number of years and the Government has made no effort to deal with that problem, no effort in their

own case, no effort whatsoever during the presentation of the defendant's case. And as I apprehend the principal, when operating on a net worth basis the absence of one single asset or failure to prove that the assets which are enumerated by the Government cover the entire field is absolutely fatal. I should like to reiterate the position previously taken that there was no proof, no competent evidence of any kind as to the cash on hand. It is true that Mr. Whitsett, in rapidly answering the question, and I think unresponsively, and without an opportunity—it was no fault of his—nevertheless, the opportunity to make a proper objection at the time wasn't present, did say that at some conference Dr. Lutfy estimated or thought that might be about right or estimated that might be about right. We are certainly going to contend that the Calderon Case represents the law in this Circuit, notwithstanding that there is some division of authority there. At least we are comforted by the latest case and we believe that is not proper or competent evidence of cash on hand in that the Government was under an obligation to prove that element by independent testimony, independent of [537] any acquiescence or admission of the defendant.

On the whole case as a net worth case, which it seems to me it apparently is, I admit there are some other miscellaneous elements in it, remnants of one sort and another revolving principally around tables, as I recall, it is our contention that there is no sufficient evidence of that character to go to the Jury

and that as a net worth case the case should not go to the Jury.

I am again constrained to come back to the Government's bill of particulars and the amplifications and amendments thereof. It seems to me in considering this motion the Court should recognize the rule that whatever the extent of the record is here, the rule that is universally recognized is the bill of particulars and amendments thereto to operate to limit the proof; and that when the Government cuts the cloth to a particular width the Government must abide by its own pattern. We urge the Court to take that matter into consideration as well.

That in substance, adding only the general proposition that in our opinion there is not sufficient evidence here to submit this case to the Jury, even on the point of wilful attempt to evade or defeat a tax; I think the Government has wholly failed to show that by any substantial evidence. And that the case is in such a state that any verdict which might be rendered by the Jury adverse to the defendant would be on [538] shaky ground indeed.

For those reasons and all of them we respectfully move the Court that a direction for an acquittal be given and judgment be entered accordingly on each and every count of the indictment.

The Court: I will reserve ruling on the motion. [539]

COURT'S INSTRUCTIONS TO THE JURY

* * *

The Federal Income Tax System is primarily one of self-assessment by the taxpayer and in order to achieve the fundamental purpose of the law, which is that the taxpayer should be taxed on his actual income, Congress enacted into the Internal Revenue Code a standard to be observed by taxpayers as the basis for the returns to be made under the statute. Section 41 of the Internal Revenue Code provides: That the net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping books of such taxpayer, but if no such method of accounting has been so employed the computations shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. Thus, although the selection of a system of keeping his books rests primarily with the taxpayer, if the taxpayer's records are found to be inaccurate or not available or fail to clearly reflect his income, the Government is authorized by the statute I have just quoted to adopt a reasonable method of computation for ascertaining his taxable income. Various methods may be employed. In this case the Government has undertaken to establish the taxable income of the defendant by what is known as the net worth and expenditure method. The underlying theory of this method as employed in this case is that if a taxpayer's net worth at the beginning of a particular period is

greater than his net worth at the end [553] of the period and if such increment is not attributed to gifts, devises, loans or other non-income sources, the inference may be drawn that the increase in net worth plus the nondeductible expenditures made by the taxpayer during that period represents taxable income for the period.

The Government has placed before you evidence relating to the net worth of the defendant and his wife at the end of each of the years 1945, 1946, 1947 and 1948. A person's net worth at a given time is the difference between all his assets and all his liabilities. Loans receivable are to be considered as assets and loans payable are to be considered as liabilities in computing net worth.

Increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute the taxable net income of the defendant and his wife by this method, you should add their living and other nondeductible expenses for that year as shown by the evidence. These expenditures should be added because they are not represented in the assets which the defendant and his wife have accumulated and are not deductible expenses.

The law provides that a deduction shall be allowed for all the ordinary and necessary expenses paid or incurred in carrying on any trade or business.

The term ordinary and necessary expenses does not have any [554] specific definition but refers generally to expenditures which have a reasonable relationship to the carrying on of a business.

In using the net worth and expenditure method of computation and proof it is incumbent upon the Government to satisfy you beyond a reasonable doubt that expenditures made by the taxpayer for the years in question were from taxable earned income for each of the particular years and not from a surplus which the taxpayer had built up in previous years, or other non-taxable sources.

It is incumbent on the Government to satisfy the Jury beyond a reasonable doubt that the increased net worth of the defendant for each of the years in question, if such increase be proved, was built up out of earned taxable income for each of the prosecution years and did not come to either the defendant or his wife from gifts or inheritances or other non-taxable income.

The Government must also prove beyond a reasonable doubt that the increased net worth in evidence here covered by the indictment could not have come from income reported by the taxpayer and on which he paid income tax.

In a net worth case, attention is focused on the difference between the taxpayer's assets and liabilities as of the beginning and the end of a given prosecution year. The increase, if any is shown, may be inferred to be net income if [555] certain conditions are present. These conditions are:

1. That there is evidence of a possible source or sources of income to account for the expenditures of the increased net worth.
2. That there is a fixed starting point to which

the taxpayer's financial condition can be affirmatively established.

A starting point net worth must be established with reasonable certainty in order to rule out the possibility that the expenditures or the increased net worth were derived from prior accumulated funds or property, which, of course, could not represent income in the subsequent prosecution years.

Such a case is not based upon direct evidence but upon indirect or circumstantial evidence, or part direct and part circumstantial.

* * *

[Endorsed]: Filed December 27, 1954. [556]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Louis P. Lutfy, Defendant, numbered C-14525, Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said

case, and that the attached and foregoing copies of the criminal docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that said original documents and said copies of the criminal docket entries and of the minute entries constitute the record on appeal in said case as designated in the Appellant's Designation of Contents of Record on Appeal filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Indictment, filed February 26, 1953.
2. Defendant's Motion for Bill of Particulars, filed April 20, 1953.
3. Government's Bill of Particulars, filed April 24, 1953.
4. Minute entry of May 4, 1953. (Arraignment and plea.)
5. Minute entry of October 9, 1953. (Trial setting.)
6. Government's Amended Bill of Particulars, filed December 15, 1953.
7. Minute entry of December 23, 1953. (Order for filing of proposed amended Bill of Particulars as Bill of Particulars herein and trial resetting.)
8. Defendant's Motion for Further Particulars, filed January 25, 1954.
9. Government's Reply to Defendant's Motion for Further Particulars, filed February 8, 1954.

10. Minute entry of February 8, 1954. (Order striking Defendant's Motion for Bill of Particulars subject to reinstatement by either party.)

11. Minute entry of September 7, 1954. (Proceedings of trial.)

12. Minute entry of September 8, 1954. (Proceedings of trial.)

13. Minute entry of September 9, 1954. (Proceedings of trial.)

14. Minute entry of September 10, 1954. (Proceedings of trial.)

15. Minute entry of September 14, 1954. (Proceedings of trial.)

16. Minute entry of September 15, 1954. (Proceedings of trial.)

17. Minute entry of September 16, 1954. (Proceedings of trial.)

18. Verdict, filed September 16, 1954.

19. Government's Exhibits 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 29, 30, 31, 32, 33, 34 and 38.

20. Defendant's Exhibits A, B, C, D, E, F, G, H and I.

21. Defendant's Motion for New Trial, filed September 20, 1954.

22. Minute entry of September 20, 1954. (Order granting additional time for Defendant to file supplemental grounds in support of motion for new trial and resetting for sentence.)

23. Minute entry of October 18, 1954. (Order denying Defendant's Motion for New Trial.)

24. Judgment, filed October 18, 1954, docketed October 18, 1954.

25. Order Granting Stay of Execution and Admitting to Bail on Appeal, filed October 18, 1954.
26. Notice of Appeal, filed October 18, 1954.
27. Docket entries of March 12, 1954, and October 18, 1954.
28. Minute entry of November 18, 1954. (Order extending time to file record on appeal to and including January 4, 1954.)
29. Order Extending Time for Docketing Appeal and Transmitting Record to and including January 17, 1955.
30. Designation of Contents of Record on Appeal, filed October 25, 1954.
31. Statement of Points upon which Defendant-Appellant Relies on Appeal, filed October 25, 1954.
32. Reporter's Transcript of Proceedings, Volume I, filed December 27, 1954.
33. Reporter's Transcript of Proceedings, Volume II, filed December 27, 1954.
34. Minute entry of January 10, 1955. (Order extending time for docketing Record on Appeal to and including February 1, 1955.)

I further certify that the Clerk's fee for preparing and certifying this said Record on Appeal amounts to the sum of \$7.20, and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court, at Tucson, Arizona, this 17th day of January, 1955.

[Seal]

WM. H. LOVELESS,
Clerk.

By /s/ CATHERINE A. DOUGHERTY,
Chief Deputy.

[Endorsed]: No. 14630. United States Court of Appeals for the Ninth Circuit. Louis P. Lutfy, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed January 20, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14630

LOUIS P. LUTFY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES ON APPEAL

The points upon which appellant relies in this appeal are as follows: (References are to original Reporter's Transcript.)

I. Court erred in refusing appellant's motion to strike all evidence of net worth and in submitting case to jury as a net worth case.

A. This was not a proper case for net worth proof.

1. Appellant kept a regular set of books of average quality (R. T. 404, 1. 7-24).

2. Every item of professional income entered in books. (R. T. 120, 1. 10-25).

3. Accurate books kept (R. T. 138, 1. 16-24).

4. Appellant stressed accuracy in keeping of books and records. (R. T. 122, 1. 15-17; 135, 1. 12-17; 138, 1. 3-7).

B. Government failed to meet established standards for proof of net worth.

1. Amount of cash available at beginning of period was not established beyond speculation.

(a) Court allowed government to engage in a fantastic process of computation (R. T. 199, 1. 19 to 201, 1. 22). See also (R. T. 199, 1. 1-18).

(b) Government's proof showed no competent corroboration of appellant's extra-judicial statement (if such was made), as to amount of cash available at the beginning of the prosecution period.

(c) Government's evidence tends strongly to show the probability that appellant may have had a much larger sum on hand December 31, 1945, than that allowed by Government's net worth computation.

(1) Cashed \$14,195.12 in Government bonds November 24, 1944. (R. T. 62, 1. 1-24.)

(2) No showing that appellant spent proceeds of Government bonds prior to December 31, 1945.

(3) In 1944, a loan of \$4,400.00 repaid to appellant (R. T. 296, 1. 23 to 297, 1. 2), and no showing that this cash had been spent.

(4) Government agent was unable to testify he had accounted for all appellant's assets at the beginning of the prosecution period. (R. T. 313, 1. 21 to 314, 1. 3.)

2. Government made no effort to consider non-taxable sources of income during prosecution years.

(a) No effort made to give consideration to unrepaid loan from a Mrs. Linsenmeyer in amount of \$3,500.00 in 1947. (R. T. 296; 345, 1. 4-16.)

(b) Government ignored assets in form of life insurance of \$45,000.00. (R. T. 347, 1. 16 to 348, 1. 5; 369, 1. 20 to 370, 1. 19.)

(c) Government ignored gifts of money received during prosecution period, (R. T. 312, 1. 10-24; 340, 1. 5-7) or sale of assets (R. T. 359, 1. 20 to 360, 1. 12).

3. Government's net worth evidence is fully reconcilable with full and true reporting of all income by appellant, and was fully answered. (R. T. 407; 409; 411, 1. 1-24; 414, 1. 15-23; 416; 417 and 418 to 1. 19; 418, 1. 20 to 421, 1. 9; 421, 1. 10-16; 422, 1. 4-17.)

II. The district court erred in the admission and rejection of evidence to the prejudice of appellant.

A. The Court erred in admitting over objection the following Government exhibits: No. 6, 9, 10, 13 and 27, for reason same were incompetent, irrelevant, immaterial, prejudicial, non-probative and outside the scope of the Government's bill of particulars and amendments thereto.

B. The United States attorney prejudiced the rights of appellant in calling as witnesses the following persons whose inability to give competent or credible testimony must have been known to him:

Robert F. Herre (R. T. 50-57) ; Clarence J. Beale (R. T. 32-88).

III. The district court, notwithstanding timely objections, failed to afford the appellant with the protective cautions in the admission of evidence offered by the government as outlined in *Holland vs. U. S.* (decided U. S. Supreme Court, December 6, 1954) and appellant was thereby deprived of his rights to due process of law and a fair and impartial trial.

A. Government agent volunteered numerous prejudicial statements that could not be guarded against by appellant. (R. T. 182, 1. 5-15; 183, 1. 7-8; 184 1. 10-15; 184, 1. 21 to 185, 1. 5; 188, 1. 8-24; 190, 1. 11-13; 196, 1. 18-25.)

B. District court allowed Government witness to broadcast opinions on technical legal questions, over objection, and thus the province of the jury was invaded. (R. T. 198-202, 1. 1; 206, 1. 7-20; 227, 1. 4-25; 234, 1. 21 to 335, 1. 4; 236, 1. 6-25; 239, 1. 7-17; 240, 1. 1 to 245, 1. 4.)

1. Government's witness was not qualified and no proper foundation of expertness established either in law or accounting. (R. T. 207.)

2. Government agent was permitted to mislead jury on subject of unreported income. (R. T. 240; 241; 268, 1. 13 to 269, 1. 25.)

IV. Court, over objection, permitted the Government to freely depart the scope of its bill of particulars, amended bill of particulars, and supplement thereto.

A. Especially was proof regarding depreciation, outside Government's specifications. (R. T. 261, 1. 20 to 262, 1. 5; 425, 1. 18 to 426, 1. 14.)

B. Court erred in admitting Exhibit No. 27 in evidence, over proper objection.

V. That the Court erred generally in overruling defendant's objections seeking to limit government's evidence to the scope of the bill of particulars, amendment and supplement thereto.

VI. That the Court erred in failing to grant defendant's motion to strike all evidence of the Government relating to defendant's net worth, including Exhibit No. 33.

VII. That the verdict of the jury is contrary to the weight of the evidence.

VIII. The jury's verdict is not supported by substantial evidence.

IX. That the Court erred in denying defendant's motion for acquittal made at the conclusion of all of the evidence in the case.

X. That the Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's evidence.

Dated at Phoenix, Arizona, this 31st day of January, 1955.

/s/ DARREL R. PARKER,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 1, 1955.

